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FEE EXEMPT

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

11 CHINO BASIN MUNICIPAL WATER DISTRICT,) CASE NO. RCV 51010
12 Plaintiff,) Judge: Honorable J. MICHAEL GUNN
13 v.)
14 THE CITY OF CHINO,) **POST-ORDER MEMORANDUM**
15 Defendants.)

HATCH AND PARENT
21 East Carrillo Street
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18 I
19 INTRODUCTION

20 During the four-month period from March until the end of June of this year, the Parties¹ to
21 the Judgment negotiated an agreement to resolve long-standing issues that were inhibiting the
22 finalization of the Chino Basin Optimum Basin Management Program ("OBMP"). This agreement
23 is entitled the "Peace Agreement" and one of its intended primary benefits was to establish an open
24 and transparent review process so that the decisions of Watermaster would be clear, fair and
25 consistent. When the Peace Agreement was finalized, it was presented to the Advisory Committee
26 and Watermaster for approval.

27
28 ¹ Certain terms used in this Post-Order Memorandum are also specially defined by the Peace Agreement.
Where such a specially defined term is used in this memorandum it will be capitalized.

1 Watermaster was requested to approve the Peace Agreement and declare its intention to
2 proceed in accordance with its terms. To further buttress Watermaster's commitment, Watermaster
3 and the Parties transmitted the Peace Agreement and the OBMP Implementation Plan to the Court
4 for an order requiring Watermaster to proceed in accordance with the Peace Agreement.

5 The negotiation process led to a unanimous agreement by the Parties to the Peace Agreement
6 that certain amendments to the Judgment be pursued. The subjects that *unanimously* qualified for
7 amendments to the 1978 Judgment were submitted to this Court on August 15, 2000.
8 (Watermaster's Motion to Amend the Judgment dated August 14, 2000, pp.2-3.)

9 The amendments were unopposed. After conducting a hearing on the proposed amendments,
10 the Court ultimately approved the OBMP in its entirety on September 28, 2000. By its terms, the
11 Effective Date of the Peace Agreement became October 1, 2000.

12 Watermaster's requests for the amendments became the subject of a report by the Special
13 Referee, filed on September 13, 2000. In supporting Watermaster's request for approval of the
14 OBMP and the requested amendments to the Judgment, the Special Referee recommended that
15 Watermaster provide clarification and invited the Parties to submit a post-order memorandum to the
16 Court. This memorandum would then serve to create a historical record concerning the rationale and
17 justification for the changes to assist in future interpretation and construction of the Judgment and
18 the OBMP. Watermaster agreed to provide such a memorandum and the Court so ordered.

19 The Referee also submitted another report to the Court on September 25, 2000, which further
20 identified subjects that would benefit from some recorded clarification. However, the vast majority
21 of these subjects will be addressed primarily through future revisions to the Uniform Groundwater
22 Rules and Regulations ("UGRR") and supporting and companion memorandum to be subsequently
23 filed with this Court. Watermaster intends that there will be a comprehensive revision of the UGRR
24 that will include the development of procedures for the accounting of all water added to and extracted
25 from the Basin, criteria for reviewing the Transfer of water, procedures for directing Recharge so as
26 to achieve long-term hydrological balance in all areas and sub-areas of the Basin, procedures for
27 managing the various types of storage accounts that exist within the Basin, procedures describing
28 how Stored Water will be recovered, and a comprehensive compilation of the definitions used in both

1 the Peace Agreement and the Judgment. The present memorandum contains Watermaster's
2 responses to the questions raised by the Referee that are pertinent to the proposed amendments to
3 the Judgment.

4 II

5 **CLARIFICATION OF SUBJECTS IDENTIFIED IN SPECIAL REFEREE'S REPORTS**

6 The Special Referee's reports raise several subject areas that would benefit from the
7 development of further clarification and an appropriate record to aid in future judicial construction.
8 Each of these subjects is addressed below.

9 **A. Transfers**

10 The established policy of the State of California is to promote water transfers to facilitate the
11 efficient use of water. (See Water Code §§ 109(b) and 475; see generally, Thompson, *Institutional*
12 *Perspectives on Water Policy and Markets* (1993) 81 Cal.Rep. 673). In fact, since 1980, the
13 California Legislature has adopted a plethora of statutes designed to encourage *voluntary* transfers.
14 (See e.g. Water Code §§ 109, 380 et seq.; 1011 et seq.; 1700 et seq.; 1725 et seq.; 1735 et seq.)

15 Transfers of surface water are subject to the review and approval authority of the State Water
16 Resources Control Board (SWRCB). (See Water Code § 1700 et seq.) However, transfers of rights
17 to percolating groundwater are not subject to the SWRCB's jurisdiction, which generally requires
18 challenges to the transfer of groundwater rights to be resolved by the courts.

19 Adjudicated basins provide a transaction advantage to transferors, with the approval and
20 challenges being addressed under Watermaster jurisdiction. Thus, it is no surprise that modernly, the
21 transfer of groundwater rights occurs routinely in adjudicated groundwater basins throughout
22 Southern California.²

23 The Judgment in the instant case was negotiated in a form that is consistent with present State
24 policy of promoting transfers and the trend of other Southern California adjudications that existed
25

26 ² *Upper San Gabriel Valley Municipal Water Dist. v. City of Alhambra*, Civil No. 924128, Cal. Super. Ct.,
27 Los Angeles County, December, 29, 1972 at 31; *Central and West Basin Water v. Replenishment Dist. v. Adams*, Civil
28 No. 786656, Cal. Sup. Ct., Los Angeles County, October 18, 1965 at 49-60; *California Water Service Company v.*
City of Compton, Civil No. 506806, Cal. Super. Ct., Los Angeles County, August 22, 1961 at 27 - 32; *Pasadena v.*
Alhambra, 33 Cal.2d 908 [207 P.2d 17] (1949); *City of Barstow v. City of Adelanto*, Civil No. 208568 (1995);
Southern California Water Co. v. City of La Verne, Civil No. KC029152, Los Angeles Superior Ct. (1998);

1 prior to 1978. In acknowledgment of the general benefits of Transfers, section 5.3 of the Peace
2 Agreement represents Watermaster's commitment to build upon the existing provisions of the
3 Judgment and to further refine the UGRR to facilitate *voluntary* Transfers of Groundwater so long
4 as they do not result in Material Physical Injury to any Party to the Judgment or the Basin. The power
5 of Watermaster to approve a voluntary Transfer will be constrained by the Judgment, the UGRR and
6 the prior orders of this Court instructing Watermaster to proceed in accordance with the Peace
7 Agreement.

8 The inclusion of a standard for the review of Transfers created by the incorporation of Section
9 5.3(a) of the Peace Agreement and the "no Material Physical Injury" standard into the UGRR does
10 not require another amendment to the Judgment. The requirement that Watermaster review any
11 proposed Transfer in light of the no Material Physical Injury standard prior to the Transfer simply
12 provides protection to the integrity of the Basin that may be properly administered by Watermaster
13 through the UGRR consistent with the Judgment.

14 At the same time, the Judgment does pose a limitation on Transfers of overlying rights
15 because of the appurtenance of the overlying rights under the Judgment. (Judgment Exhibit "G"
16 Section 6.) and the quantities of groundwater set aside for the identified overlying uses. (Judgment
17 Para 44.) Because the Peace Agreement and the implementation of the OBMP required limited relief
18 from the appurtenance limitations, Watermaster submitted an amendment regarding the Transfer of
19 nonagricultural water within the Overlying (Non-Agricultural) Pool ("Non-Agricultural Pool") and
20 to Watermaster. A second amendment was submitted regarding the conversion of agricultural land
21 to urban use.

22 1. *The Referee was concerned that while the Peace Agreement limits the use of water*
23 *Transferred to Watermaster from the Non-Agricultural Pool, the proposed Judgment*
24 *amendment does not mention such a limitation. The Referee was concerned that this may*
25 *cause future interpretive confusion with regard to this amendment and thus requested that*
26 *assurance be provided that water Transferred from the Non-Agricultural Pool to*
27 *Watermaster will be used only for Replenishment for a Desalter or Storage and Recovery*
28 *program. (9/13/2000 Report, p.3.)*

1 The Judgment previously allowed for the Transfer or lease of adjudicated rights within the
2 Appropiative Pool. (See Judgment Exhibit "H" Section 13.) It also allowed for the assignment of
3 rights by members of the Non-Agricultural Pool. (See Judgment Exhibit "G".) Consistent with the
4 State policy of facilitating water transfers and the routine handling of water transfers in other
5 Southern California adjudicated basins, Section 5.3(e) allows members of the Non-Agricultural Pool
6 to *voluntarily* Transfer or lease their quantified production rights to other members of the Non-
7 Agricultural Pool or to Watermaster. However, the amendment is limited in its scope as it only
8 allows the Transfers by the members of Non-Agricultural Pool to Transfer water to each other or to
9 Watermaster. When the Transferee is Watermaster, the Transfer must be for the purpose of either:
10 (i) Desalter Replenishment or (ii) for a Storage and Recovery program. (Proposed Amendment to
11 Judgment Exhibit "G"; Peace Agreement Section 5.3(e).)

12 The proposed Judgment amendment submitted by Watermaster is faithful to this intention
13 because it allows for the Transfer of quantified Production rights between the members of the Non-
14 Agricultural Pool, and specifically allows for Transfers to Watermaster, but limits the Transfers by
15 expressly referencing the Peace Agreement. (*Id.*) The reference to the Peace Agreement is necessary
16 because it ensures that the life of the amendment is coterminous with the Peace Agreement. As the
17 Peace Agreement represents a compromise of a wide variety of competing claims, the Parties intend
18 that unless expressly provided to the contrary, the Parties would be returned to their relative positions
19 at the expiration of the Peace Agreement. (Peace Agreement Section 8.7 and 8.10; *c.f.* Watermater's
20 Motion to Amend the Judgment, p.2.) Thus, if after thirty years, the Parties decide not to renew the
21 terms of the Peace Agreement, this amendment will also become ineffective.

22 By referencing the Peace Agreement, the Judgment amendment incorporates not only the
23 limitation of how the water that is Transferred to Watermaster may be used, it also incorporates the
24 other elements of the Peace Agreement such as the no Material Physical Injury standard of section
25 5.3(a) of the Peace Agreement. The Judgment amendment as formulated by the Parties thus ensures
26 that Non-Agricultural Pool Transfers will occur in a manner that is consistent with both the Judgment
27 and the Peace Agreement.
28

1 Most important, Section 5.3(e) then limits a Transfer between a Non-Agricultural Producer
2 and Watermaster to the purposes of (i) Replenishment for a Desalter or (ii) for a Storage and
3 Recovery Program. Watermaster holds no residual power to acquire water rights from the Parties
4 to the Judgment or to dispose of them as its powers are prescribed by the Judgment. (Judgment
5 Paragraph 17.)

6 In summary, by adopting the Peace Agreement and through the Orders of this Court directing
7 Watermaster to proceed in accordance with the Peace Agreement, Watermaster may only acquire and
8 dispose of water within the prescribed limits. The amendment also incorporates all the other
9 provisions of Section 5.3 of the Peace Agreement which require Watermaster to, among other things,
10 provide advance notice of the Transfer and ensure that the Transfer will not cause Material Physical
11 Injury to any other Party to the Judgment or to the Basin. The transparent process, opportunity for
12 comment and judicial review all provide an ample safety net to ensure that the intention of the Parties
13 is respected.

14 **2. *The previous land use conversion factor of 2.6 acre-feet per acre was developed***
15 ***after a long process of technical analysis of the actual water use in the Basin. Since such***
16 ***analysis did not apparently precede the revision of the conversion factor to 2.0 acre-feet per acre,***
17 ***the Referee requested that Watermaster explain the basis and logic for the revision of the***
18 ***conversion factor. (9/13/2000 Report, p.4.)***

19 The requested amendment to Section 10(b)(3) is actually to revise the conversion factor
20 downward from 2.6 to 2.0 rather than upward from 1.3 to 2.0. The basis and logic for the
21 amendment is best understood by considering it in the context of the 1995 amendment to the
22 Judgment concerning the same subject.

23 The 1995 amendment to Section 10(b)(3) was made to simplify the methodology by which
24 members of the Appropriative Pool make conversion claims to unproduced Overlying (Agricultural)
25 Pool ("Agricultural Pool") water in order to provide service to agricultural land that had converted
26 from agricultural to urban uses. (Exhibit "1" to Order dated November 17, 1995, amending
27 paragraph 10(b) of Exhibit "H" to the 1978 Judgment.) Contemporaneously with the request for the
28 1995 amendment, an analysis was performed that quantified the average quantity of water that could

1 reasonably be expected to be made available by the conversion of agricultural land to urban use. This
2 quantity was determined to be 2.6 acre-feet per acre. However, the 1995 amendment allocated one
3 half of this 2.6 acre-feet (1.3 afy) to members of the Appropriative Pool and the other half (1.3 afy)
4 to the specific Appropriative Pool member that was to provide water service to the property
5 converted from agricultural to urban use consistent with the original intent of the Judgment.

6 Under the Peace Agreement and the proposed amendment to 10(b)(3), the total conversion
7 factor will be revised *downward* from 2.6 acre-feet per acre to 2.0 acre-feet per acre as a more
8 conservative allocation. Moreover, the allocation of the 2.0 acre-feet converted from agricultural use
9 to urban use will be treated differently. Instead of sharing the allocation of 2.6 acre-feet with other
10 members of the Appropriative Pool, the *entire* 2.0 acre-feet will be allocated to the member of the
11 Appropriative Pool that will actually be providing service to the converted property. (Peace
12 Agreement, Section 5.3(h).)

13 In this way, any yield impacts associated with shifting approximately one-half of the
14 Production away from the area that had historically been the location of the groundwater extraction
15 are reduced. The previous conversion factor resulted in 1.3 acre-foot per acre of Production being
16 Produced in locations that were typically a great distance away from the property where the
17 Production had previously occurred and where the new development was to be sited. The former
18 approach resulted in a gradual shift in substantial quantities of Production out of the Southern part
19 of the Basin where the converted acreage is located, to the Northern part of the Basin where most
20 of the Appropriative Pool Production is located. The shift raised the prospect of rising water,
21 rejected Recharge and lost yield.

22 The revised conversion factor should also help to avoid a further deterioration of water
23 quality by encouraging continued and perhaps greater Production to protect against a further build-up
24 of salts. Thus, the conversion factor should also be viewed in combination with the operation of the
25 existing and additional Desalters that are designed to maintain Production in the areas most impacted
26 by urbanization and conversion of agricultural lands. Cumulatively, the amendment and operation
27 of the existing and additional Desalters should provide substantial benefits to Watermaster's goal of
28 maintaining Production in the Southern part of the Basin.

1 3. *Since the Peace Agreement provides for the Early Transfer of 32,800 acre-feet from the*
2 *Agricultural Pool to the Appropriative Pool without reducing the allocation of Safe Yield*
3 *to the Agricultural Pool, the Referee requested Watermaster to explain how this transfer*
4 *would occur without the Safe Yield of the Basin being exceeded. (9/13/2000 Report, p.6.)*
5 *Will the 32,800 acre-feet quantity be adjusted from year to year to reflect actual*
6 *Agricultural Pool usage? (9/13/2000 Report, p.7.)*

7 The Early Transfer provision causes a minimum quantity of 32,800 feet of water within the
8 Agricultural Pool to be made available for use by the Appropriative Pool. The water is a component
9 of that portion of the Safe Yield allocated to the Agricultural Pool and thus it is not a basis for
10 modifying the Safe Annual Yield of the Basin. (Judgment Paragraph 44.) In fact, the Safe Yield of
11 the Basin remains unchanged at 140,000 acre feet per year. (OBMP Implementation Plan, p.44,
12 Exhibit "B" to Peace Agreement.)

13 The historical record suggested that given the ongoing transition of agricultural land, that the
14 members of the Agricultural Pool are not likely to ever use 82,800 acre-feet in the future. Paragraph
15 10 of Exhibit "H" to the 1978 Judgment allows Watermaster to approve the reallocation of
16 unproduced Agricultural Pool water to the Appropriative Pool. Based upon the historical trend in
17 Production by the Agricultural Pool, it appears likely that the Agricultural Pool Production will not
18 exceed 50,000 acre-feet per year during the term of the Peace Agreement. This provides support
19 for Watermaster reallocating 32,800 acre-feet of water per year to the Appropriative Pool at the
20 beginning of the year. (See Exhibit "A" attached hereto.) The 32,800 acre-foot quantity will not be
21 adjusted *downward* from year to year. There is no intention to limit agriculture to quantities other
22 than as provided in the Judgment.

23 On the other hand, the members of the Appropriative Pool are faced with the modern reality
24 that water supply planning and implementation require considerable time and expense associated with
25 the assignment of complex rate structures, municipal financing, land use planning, and environmental
26 review. These modern realities put a high premium for the members of the Appropriative Pool on the
27 r e l i a b i l i t y o f t h e i r s o u r c e s o f s u p p l y .

28 The Peace Agreement serves to overcome the delay in and uncertainty associated with the

1 Transfer of unproduced agricultural water merely by providing greater operational certainty to the
2 Appropriative Pool by specifying the minimum amount of water that will be Transferred every year.
3 (Peace Agreement, Section 5.3(g).) However, this in no way changes the allocation of Safe Yield
4 made by the Judgment. (Judgment Paragraphs 42 and 44.) If the Early Transfer of the 32,800 acre-
5 feet results in total Production in excess of the Safe Yield, then the Appropriative Pool will correct
6 the overproduction through means which may include incurring a replenishment obligation. (See e.g.
7 Judgment Paragraph 42 and Judgment Exhibit "I".) In other words, the early Transfer does not mean
8 "overdraft" or a modification of the Safe Yield and no amendment to the Judgment is required.

9 **4. Section 5.3(i) of the Peace Agreement allows members of the Agricultural Pool to enter**
10 **into agreements with members of the Appropriative Pool for substituted service. The**
11 **Referee was concerned about whether Watermaster has the authority to approve such**
12 **agreements. (9/13/2000 Report, p.7.)**

13 Section 5.3 sets forth Watermaster's obligations regarding Transfers. A "Transfer" includes
14 the sale, lease or assignment of a right from one Producer to another. A "Producer" includes any
15 person that Produces water from the Basin.

16 Section 5.3(i) authorizes the members of the Agricultural Pool, including the State of
17 California, to enter into agreements with an appropriator which has a service territory that includes
18 the agricultural land or if the service area is contiguous thereto. The agreements are voluntary and
19 not compulsory.

20 Although Section 5.3(i) does not expressly state that these specific agreements are subject to
21 "approval" by Watermaster, all Transfers are subject to review and approval by Watermaster to
22 ensure that the Transfer is consistent with the Peace Agreement and does not result in Material
23 Physical Injury to any Party to the Judgment or the Basin. The Judgment contemplates that
24 Watermaster has the authority to implement the Physical Solution and the efficient use of water.
25 (Judgment Paragraphs. 40, 41 and 42.) A similar approval requirement is set forth in the Non-
26 Agricultural Pooling Plan for servicing non-agricultural overlying land. (See Judgment Exhibit "G".)
27 Accordingly, as a "Transfer," Watermaster has and has previously exercised its authority under the
28 Judgment to review and approve agreements for service of the type contemplated within 5.3(i).

1 **5. *What has been the historical application of the five-year Agricultural Pool***
2 ***underproduction Transfer provision? (9/13/2000 Report, p.7)***

3 Unpumped water assigned to the Agricultural Pool has been reallocated to the Appropriative
4 Pool pursuant to the Judgment in each year since 1983 at the conclusion of the first five year period.
5 Since 1988, and pursuant to Watermaster Resolution 88-3, the unpumped water has been reallocated
6 to the Appropriative Pool with a two year delay to accommodate a complete accounting of water use.
7 Exhibit "A" attached hereto depicts the amount of unpumped water reallocated from 1983 to 1998.

8 A dispute had previously arisen between the parties as to the interpretation of Resolutions 84-
9 2 and 88-3 and when the allocation of unused agricultural Production would be reallocated to the
10 Appropriative Pool. The Peace Agreement resolves this dispute and describes the procedure to follow
11 at section 8.8.

12 **6. *The Peace Agreement introduces the new term "Early Transfer" when the same***
13 ***accounting might instead have been described in terms of the Judgment's phrase***
14 ***"reallocation of unused Agricultural Pool water." Is "Early Transfer" the same as***
15 ***"reallocation of unused Agricultural Pool water"? (9/13/2000 Report, p.7)***

16 "Early Transfer" is essentially the same as the reallocation of unused Agricultural Pool water.
17 (See response A3 above.) For planning purposes, each of the appropriators, many of whom are
18 responsible for preparing and filing Urban Water Management Plans, Master Water Plans and issuing
19 can-and-will-serve letters, desire a more formal statement of their relative share of the Chino Basin
20 water. By ensuring the Early Transfer for the life of the Peace Agreement, the appropriators can
21 better anticipate the relative share of the underproduction pursuant to the Peace Agreement and plan
22 accordingly. In the end, however, their potential exposure to replenishment obligations remains
23 unaffected. That is, if they over-produce, they still incur a replenishment obligation. Again, there is
24 no overdraft permitted by this accommodation.

25 ///

26 ///

27 ///

28 ///

1 **B. Safe Yield and Operating Safe Yield**

2 1. *The Judgment does not explicitly include the concepts of New Yield and Recharged*
3 *Supplemental Water within the calculation of Operating Safe Yield. The Referee*
4 *requested an explanation as to why no Judgment modification is required in order to add*
5 *New Yield and Recharged Supplemental Water in the calculation of Operating Safe*
6 *Yield? (9/13/2000 Report, p.7)*

7 The parties to the Judgment and Watermaster considered this matter at great length. While
8 it may be argued that such an amendment is necessary, there is, and has always been great reluctance
9 on the part of many to modify any of the core definitions in the existing Judgment. There is also an
10 equally strong reluctance to modify the Safe Yield of the Basin without having a robust historical and
11 scientific record regarding recharge and production.

12 In theory, the members of the Appropriative Pool, that are responsible for assuming any
13 significant replenishment obligation and the attendant financial consequences would have a financial
14 incentive to recalculate Safe Yield to a higher number. Those that were trying to force recharge
15 would have an incentive to reduce the number downward.

16 The introduction of the New Yield concept was designed to address this tension without
17 requiring a formal amendment to the Judgment. (See Peace Agreement 1.1(aa).) The Parties and
18 Watermaster believe this is possible and prudent for several reasons.

19 In the instant case, paragraph 1(a) of Exhibit "I" of the 1978 Judgment defines the Operating
20 Safe Yield of the Basin to be the Appropriative Pool's share of Safe Yield of the Basin, *plus* any
21 controlled overdraft of the Basin which Watermaster may authorize. The Appropriative Pool's share
22 of the Safe Yield of the Basin is determined by subtracting the quantified Production rights of the
23 Agricultural Pool and the Non-Agricultural Pool from the overall Safe Yield. Whatever is left is the
24 Appropriative Pool's share.

25 The Safe Yield of the Basin is defined as the long-term average annual quantity of
26 groundwater which can be Produced from the Basin under the *cultural conditions* of a particular year
27 without causing an undesirable result. (Judgment, p.4.) The Judgment *does not* specify what factors
28 should be used to determine the inflow into the Basin except to parenthetically *exclude* Replenishment

1 and Stored Water, and include return flows from the use of Replenishment or Stored Water.
2 Obviously native water recharged into the Basin and subsurface inflows are large components of the
3 Safe Yield. To the extent that new management methods undertaken by Watermaster are proven to
4 successfully augment the historical quantities of recharge and inflow into the Basin, the definition of
5 "New Yield" can accommodate the augmented supply within the allocable Operating Safe Yield,
6 *without* modifying the definition or presently estimated quantity of the Safe Yield of the Basin.

7 Ultimately, given a sufficient historical and scientific record, the quantity of New Yield may
8 be included within a revised Safe Yield number. However, Watermaster does not anticipate such a
9 recalculation for a period of years.

10 **2. *Since the desalters will be removing water from the Basin, the Referee requested***
11 ***clarification as to why Desalter operations are a component of New Yield. (9/13/2000***
12 ***Report, p.9.)***

13 Desalter operations do not necessarily add to New Yield. However, it is possible if not
14 probable, that the Desalters will serve to induce *some* new or additional Recharge beyond the
15 quantities achieved in the present historical record. To the extent the location and operation of the
16 Desalters is proven to serve as an effective management tool to improve Recharge and add to the
17 yield of the Basin, it may thereby constitute "New Yield." On the other hand, if the Desalter
18 operations do not generate increased recharge, they will not be a component of New Yield.

19 In any event, the Peace Agreement specifies that Desalter operations will incur a
20 replenishment obligation if there are insufficient supplies from sources such as New Yield. (Peace
21 Agreement, §7.5(b).) In the final analysis, this treatment serves to encourage Watermaster and
22 particularly the members of the Appropriative Pool to improve recharge efficiency as soon as
23 possible.

24 **C. Assessments and Credits**

25 **1. *Why are OBMP expenses not special project expenses? (9/13/2000 Report, p.12.)***

26 The historical practice of the parties to the Judgment, Watermaster Staff and Watermaster has
27 been to assess all charges of general benefit as a General Administrative Expense. The Judgment
28 provides that Administrative Expenses shall be divided into two categories: (i) General Administrative

1 (“General Expense”) and (ii) Special Project (“Special Expense”). Traditionally, Watermaster has
2 applied a practical construction to these terms whereby General Expenses are equated with general
3 benefit and Special Expenses are equated with special benefit. Consequently, virtually all
4 Watermaster expenses related to management of the Basin have been characterized as “General
5 Expenses.” Those expenses which uniquely benefit a limited number of Producers are treated as a
6 Special Expense.

7 Despite the fact that a strict construction of the definitions within the Judgment might suggest
8 an alternative treatment, Watermaster would prefer that the majority of the OBMP costs be treated
9 as General Expenses as the benefits accrue “generally” to all Producers. It may be that some OBMP
10 expenses may actually be considered Special Expenses to the extent they relate to a defined problem
11 with specifically studied remedial measures and equipment that uniquely and specially benefits one
12 or more parties to the Judgment. The following example illustrates the proposed practical distinction
13 that Watermaster desires to perpetuate.

14 It is a Watermaster administrative responsibility to monitor all production from the Basin.
15 (Judgment Paragraph 21.) Accordingly, Watermaster’s collection of data from the Producers,
16 analysis of the data and the filing of reports concerning total production are a “General Expense” as
17 the service redounds to the benefit of all Producers. Conversely, the actual purchase and installation
18 of meters on specific wells owned by various Producers would be a benefit that was enjoyed primarily
19 by the Producer that received the meter.

20 Watermaster’s prior construction of the terms over the past 22 years provides sufficient
21 justification to maintain the general benefit versus special benefit distinction and classify the OBMP
22 expenses as General Expenses.

23 **2. What are “salt credits”? Are they relevant to Watermaster accounting? (9/13/2000 Report,**
24 **p.12.)**

25 “Salt credits” are defined in the Peace Agreement as:

26 “[A]n assignable credit that may be granted by the Regional Water Quality Control
27 Board and computed by Watermaster from activities that result from the removal of
28

1 salt from the Basin, or that result in a decrease in the amount of salt entering the
2 Basin.” (Peace Agreement Section 1.1(r).)

3 That is, under its authority to regulate water quality, the Regional Water Quality Control Board
4 (RWQCB) has set limits to the amount of salt that can enter the Chino Basin. (See Implementation
5 Plan, p.46.) If the implementation of the OBMP reduces the amount of salt in the Basin, the RWQCB
6 *may* grant credits against such reduction that will allow for other activities that may have otherwise
7 been inhibited due to the regulatory limitations. Watermaster is given the responsibility of *determining*
8 *how these salt credits will be allocated* among the members of the Appropriative Pool.

9 Under the Peace Agreement, whatever Salt Credits that *may* accrue or be awarded by the
10 Regional Board from the implementation of the OBMP shall generally be assigned among members
11 of the Appropriative Pool by Watermaster.(Peace Agreement Section 5.5.) This is a component of
12 bargained-for consideration in the Peace Agreement that Watermaster intends to respect. The
13 members of the Appropriative Pool have become responsible for any short-falls in the development
14 of Recharge Water and ultimately replenishment obligations to ensure against overdraft of the Basin.
15 If the Desalters require Replenishment Water, it is the Appropriative Pool that is ultimately
16 responsible after the exhaustion of other alternatives. Accordingly, it is reasonable that they receive
17 the benefits of any Salt Credits that *may* be awarded by the RWQCB.

18 The Judgment declares there is a need for Watermaster to remain flexible to use future
19 economic and institutional options to further the Physical Solution. (Judgment Paragraph 40.) With
20 the advent of the OBMP it is undeniable that water quality has an impact on the number and quality
21 of beneficial uses Chino Basin can support. Therefore, it is natural that some consideration of actions
22 by the Producers to improve water quality would be of interest to the Producers generally and to
23 Watermaster.

24 In the future, the actions of individual Producers, when viewed independently, may cause
25 some form of water quality degradation while on balance still facilitating the overall implementation
26 of the OBMP. The development and use of recycled water is one example. The use of recycled
27 water may have important water supply benefits while increasing the salt-load on the Chino Basin.
28

1 Such a project might incur regulatory responses from the RWQCB, including the need for Salt
2 Credits to be used as off-sets against impacts associated with those activities.

3 It is also essential that Watermaster fairly allocate the credits to future projects for the general
4 benefit of the Appropriative Pool. The Salt Credits will have been earned by the efforts and actions
5 of the entire Appropriative Pool and the benefits should be fairly meted out to ensure the maximum
6 benefit for those projects that add to the end goal of timely implementation of the OBMP.

7 **D. Holding Water Rights in Trust**

8 **1. *The Judgment is ambiguous as to the authority of Watermaster to take title to real***
9 ***property, but the Peace Agreement is clear that Watermaster shall not own such property.***
10 ***However, Watermaster is authorized by the Peace Agreement to hold water rights in trust.***
11 ***For the sake of future interpretation, the Referee requested that the authority for***
12 ***Watermaster to hold water rights in trust be clarified. (9/13/2000 Report, p.13.)***

13 The over-arching purpose of the physical solution embodied in the Judgment was to provide
14 the “maximum reasonable beneficial use of the waters of the Chino Basin by providing optimum
15 economic, long-term, conjunctive utilization of surface waters, ground waters and supplemental
16 water, to meet the requirements of water users having rights in or dependent upon Chino Basin.”
17 (Judgment Paragraph 39.) Watermaster exists solely as a creature of the Judgment and carries out
18 those duties it is assigned by the parties to the Judgment.

19 It is true that the Judgment does recite that it is not the Court’s intention that Watermaster
20 own interests in real property (Judgment Paragraph 19.) Nevertheless, while the Judgment does not
21 expressly say that Watermaster may acquire and hold water rights in trust for the benefit of the Parties
22 to the Judgment, there are some compelling reasons to believe this is well within the power and
23 authority of Watermaster. The fact that Watermaster may not own real property for its own use
24 should not be determinative of its ability to hold water rights in trust. Here is why:

25 First, Watermaster’s express duties include the accomplishment of replenishment by “any
26 reasonable method”, including but not limited to spreading, percolation and injection and in-lieu
27 procedures. (Judgment Para. 50.) Securing water rights in trust for the benefit of the Parties to the
28 Judgment is one such reasonable method of accomplishing recharge and replenishment. In fact,

1 Watermaster has previously secured water rights in the past. For example, Watermaster already holds
2 two water rights permits. The first is Permit 19895 for diversion from Day Creek and East Etiwanda
3 Creek. The second is Permit 20753 for diversion from San Sevaine Creek and East Etiwanda Creek.

4 Second, read together Paragraphs 19, 20, 25, and 26 authorize Watermaster to purchase,
5 lease, acquire, and hold all necessary facilities, enter into agreements and cooperate with State and
6 Federal Agencies to implement the Physical Solution. Although these Paragraphs do not expressly
7 include the power to acquire water rights in trust, it is the type of conduct that can be fairly viewed
8 as consistent with the prescribed powers.

9 Third, Watermaster's authority in this regard must be understood in the context of the need
10 for flexibility set forth in Paragraphs 40 and 41 of the Judgment. Specifically, the Judgment recites
11 that it remains essential that the Physical Solution provide "maximum flexibility and adaptability" so
12 that Watermaster can pursue institutional and economic options that will maximize the beneficial use
13 of water of Chino Basin". (Judgment Para 40.)

14 Fourth, there is legal precedent for water users cooperating in their efforts to secure and
15 manage their water rights by designating a trustee to act for their common benefit. For example,
16 there are cases where mutual water companies hold bare legal title for the benefit of the equitable
17 owners of their water rights without severing or modifying the character of the underlying water
18 rights. (*Locke v. Yorba Irr. Co.* (1950) 35 Cal.2d 205, 209 [217 P.2d 425]; *Imperial Water Co. No.*
19 *5 v. Holabird* (9th Cir. 1912) 197 F. 4, 5-7.) As in the instant case, such arrangements can serve to
20 reduce conflicts among those with shared rights in a common water supply.

21 Fifth, as is indicated by the limited nature of the holding of bare legal title in trust for the
22 benefit of the parties to the Judgment, it is *not* Watermaster's intention to compete with the Parties
23 to the Judgment or to encroach upon their individual powers and authorities. To be sure,
24 Watermaster must maintain its independence to review, analyze and condition the actions of the
25 parties to the Judgment and other persons to ensure the maintenance of the Physical Solution and to
26 properly function as an arm of the Court.

27 ///

28 ///

1 As the original Judgment recognized in 1978, changing circumstances will create challenges
2 that demand some flexibility by Watermaster to work pro-actively, with the consent of the parties to
3 the Judgment, to secure legal rights to spreading facilities and water rights for common benefit.

4 Watermaster's agreement to accept the charge of holding water rights in trust has not been opposed
5 by a single Party to the Judgment and is otherwise permissible under the Judgment. However,
6 because Watermaster accepts the potential concerns that might arise from Watermaster holding water
7 rights, even if in trust, coincident with its processing of an application to appropriate water and prior
8 to taking possession of additional water rights, Watermaster will submit a proposal to the Court to
9 confirm this authority.

10 E. Definitions

11 1. *The Peace Agreement includes new or revised definitions, but does not recommend*
12 *changes to any of the definitions in the Judgment. Why not? (9/13/2000 Report, p.14.)*

13 The Parties to the Peace Agreement reached a delicate compromise regarding various matters
14 and Watermaster has sought to respect the expressed desire of the Parties regarding amendments to
15 the Judgment. The definitions introduced by the Peace Agreement were not intended to conflict with
16 any definitions included in the Judgment. Moreover, at least one party to the Judgment has such a
17 strong view of the subject that they have emphatically stated that they would oppose any additional
18 amendments to the Judgment in connection with the adoption of the OBMP and the approval of the
19 Peace Agreement.

20 Watermaster agrees that adding or revising definitions to the Judgment in the future may
21 improve the overall understanding of the Judgment. However, at the present time Watermaster does
22 not believe that new definitions are essential to effectuate the will of the Parties and to responsibly
23 carry-out the provisions of the OBMP. Of course, if this assumption proves incorrect, Watermaster
24 may revisit this issue and seek to obtain a consensus to support a specific amendment with the benefit
25 of a record and context for the proposal.

26 In addition, the revised UGRR will provide an opportunity to unify the definitions contained
27 in the Judgment and the Peace Agreement and to reconcile any perceived disjunction between these
28 two authorities. An example of one such apparent disjunction can be found in the discussion of the

1 various components of Operating Safe Yield contained in this Post-Order Memorandum at section
2 B.1. In Watermaster's view, the definition of Operating Safe Yield contained in the Peace Agreement
3 is entirely consistent with the definition contained in the Judgment, and the revision of the UGRR will
4 provide an opportunity to articulate this common definition.

5 **F. Judicial Review**

6 1. *Clarify that the Peace Agreement's statement of the right to judicial review of*
7 *Watermaster actions is not intended to act as a limitation on the Court's continuing*
8 *jurisdiction. (9/13/2000 Report, p.14.)*

9 The Peace Agreement does not reflect any intention of the Parties or Watermaster to modify
10 the rights of judicial review that exist under the Judgment. The remedies available to the Parties to
11 the Peace Agreement for breach of that Agreement are completely inter-se and are separate and
12 independent from any rights they may possess under the Judgment. The rights of the Parties are
13 cumulative.

14 Watermaster is not a signatory to the Peace Agreement. No amendment to the Judgment has
15 been proposed to modify the Court's authority, whatever it may be.

16 It is true that the Peace Agreement does create a series of additional remedies that may be
17 available in the event the Peace Agreement is breached by a Party to that Agreement. For example,
18 Section 9.2 establishes that the remedies of Specific Performance and Injunction may be sought for
19 breach of the promises and commitments made under the Peace Agreement that may be difficult to
20 redress through money damages. Moreover, Section 9.3 creates an obligation for the Parties to
21 pursue dispute resolution on such matters through non-binding mediation. However, emergency
22 matters and review of Watermaster actions and other matters subject to judicial review under the
23 Judgment are unaffected and are not controlled by this requirement. (Section 9.3(b)(iii).) In
24 conclusion, there is no limitation on any Party to the Judgment's rights of judicial review or the
25 Court's continuing jurisdiction under the Judgment, whatever they may be.

26 ///

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28 ///

1 **G. Funding**

2 **1. Report on satisfaction of Peace Agreement condition precedent relating to Proposition 13**
3 **funding. (9/25/2000 Report, p.3.)**

4 As Section 3.1(b) is framed in terms of the appropriation of money to be distributed to
5 SA WPA rather than with regard to the further step of distribution of the funds to specific Chino Basin
6 projects, the condition is met upon a gross allocation of funds. (Peace Agreement, Section 3.1(b).)
7 In fact, the legislature has actually appropriated \$131,000,000 for fiscal year 2000-2001 for the
8 benefit of SA WPA, or roughly \$10,000,000 more than required to satisfy the condition precedent.

9 Section 3.1(b) set forth a general threshold for funding both capital components of specific
10 tasks such as the construction and operation of Desalters as well as the prospect of additional funds
11 being used in connection with other programs contained with the OBMP. To be sure, the passage
12 of Proposition 13 by the voters was a key catalyst to the adoption of the OBMP and ultimately
13 Watermaster's success in implementing any of its elements. However, determining precisely how the
14 money might be used for specific projects and opportunities that were in various stages of planning,
15 design and review at the time the OBMP was being scheduled for approval was not prudent or wise.
16 This is especially true, given that environmental review was not yet complete and that Watermaster
17 could not pre-commit to projects that had not been subjected to an arms-length review for
18 consistency with the OBMP and a no Material Physical Injury standard that was in the process of
19 being negotiated at the same time.

20 The result of the negotiations was to establish conditions precedent in the Peace Agreement
21 that respected the complex compromises and commitments that the Parties were willing to make,
22 while at the same time in some cases reserving discretion to one or more Parties regarding the best
23 manner of performance. In other words, the Parties sought to provide for some adaptive management
24 without sacrificing the binding nature of their underlying commitments. Condition 3.1(b) was
25 designed to satisfy *both* the requirement of maintaining binding commitments and operational
26 flexibility.

27 Through the negotiations, the Parties matched the potential financial costs and burdens of
28 moving forward with the OBMP against the corresponding benefits. Assuming the cost and benefit

1 projections were reasonably accurate, a great deal of uncertainty surrounded the true availability and
2 reliability of certain funding sources. Even assuming that substantial funds were available, the
3 question remained as to how tightly the funds should be tied to specific projects.

4 The Parties systematically sought to ascertain the potential magnitude of funding support from
5 persons and government entities that had no direct stake in the negotiations (third parties) but who
6 might derive some indirect benefits from a success in the negotiations. The most obvious and
7 understood form of third party funding was identified to be the bond measure that was slated for a
8 public election in March of 2000.

9 Once the measure was ultimately passed by the California electorate, the Parties were able to
10 move further towards making some actual legally binding commitments. There was serious doubt
11 about the wisdom of completely dedicating all funds that might be made available without first having
12 scrutinized each project for its ability to satisfy OBMP goals. Consequently, the Parties set out upon
13 the only proper course to begin to match available funding with Party responsibility and performance
14 standards.

15 It was envisioned that the Parties, and Watermaster at their request, would make
16 commitments to specific projects and programs identified in the Peace Agreement and in the OBMP,
17 while still preserving operational flexibility. In some instances commitments were made to avoid
18 overproduction and overdraft, while leaving the precise method for augmenting recharge to be
19 dependent upon some exercise of discretion. Thus, in some cases the Parties committed to specific
20 actions and in other instances committed only to performance standards. For example, the Parties
21 agreed to have Watermaster arrange for the procurement of 6,500 acre feet of Recharge at specific
22 locations, while making more general commitments to balance overall Production and Recharge. The
23 final decision on which projects were the best over the next 60 years will necessarily require the
24 exercise of some discretion and review by Watermaster over time. As the negotiations came to a
25 close, consistent with the Court Ordered time-line, the actual schedule and method for appropriation
26 of funds from Proposition 13 was still uncertain. For example, it was unclear how the State would
27 distribute such funds if they were appropriated by the Legislature and whether any specific linkage
28

1 to the Chino Basin was sufficiently firm to support reliance by Watermaster and the Parties to the
2 Agreement.

3 One of the most difficult subjects to resolve concerned the series of issues related to the
4 planning, design, ownership and operation of the Desalter Facilities. While the Peace Agreement
5 reflects the actual commitments made regarding the Desalters, these commitments, as all other
6 commitments in the Peace Agreement, were made subject to the appropriation of funds by the
7 California Legislature.

8 It was generally understood that two of the Parties to the Peace Agreement were in a superior
9 position to secure the portion of the funding that was available under Proposition 13, if the other
10 Parties and Watermaster supported their efforts. Both the Inland Empire Utilities Agency (IEUA)
11 and Western Municipal Water District (WMWD) had tracked the measure and, as members of the
12 Santa Ana Watershed Project Authority (SAWPA), they had participated in earlier discussions with
13 the SWRCB concerning the process under which the funds would be actually allocated to local
14 projects once the money had been appropriated by the Legislature.

15 The condition precedent regarding funding should be understood in this context. IEUA and
16 WMWD expressed their commitments so as to make it clear that they were assuming the general
17 obligations as the suppliers of the desalted water under Article VII of the Peace Agreement.
18 Irrespective of whether they chose to act independently or through Project Committee Number 14
19 of the Santa Ana Watershed Project Authority, their commitments regarding the Desalters were
20 dependent upon an understood level of appropriation for SAWPA. So too, the potential purchasers
21 of desalted water wanted assurance that once SAWPA and IEUA and WMWD received the required
22 funding, they would properly apply the funds so as to meet the price and quantity commitments also
23 contained in Article VII.

24 Given the time challenges posed by full allocation of all funds to the Chino Basin projects and
25 programs when compared against the Court's time requirement of June 30, 2000 for adoption of the
26 OBMP, it would not be possible for the Parties to wait until the full legislative allocation was
27 complete before expressing binding commitments. All Parties were willing to pledge their best efforts
28 to assist in the securing of funding and to coordinate their efforts. (Section 4.7) As drafted, WMWD

1 and IEUA were willing, however, to assume the responsibility for running the gauntlet of the SAWPA
2 process given a minimum gross allocation of \$121,000,000.

3 In summary, a more general funding condition set forth in Section 3.1(b) appeared prudent
4 and sufficiently enforceable given (i) IEUA's and WMWD's unique position among the Parties to the
5 Peace Agreement to know, understand and facilitate the flow of money from this more general
6 appropriation of \$121,000,000 to the specific projects and programs required to implement the Peace
7 Agreement; (ii) the pledge of all Parties to exercise best efforts and (iii) the need to reserve
8 Watermaster's discretion to ensure that the projects and programs comply with the OBMP and to
9 review and approve future projects against the no-Material-Physical-Injury standard.

10 It is expected that the remaining funding for SAWPA under Proposition 13 will be
11 appropriated in subsequent fiscal years but neither the Parties' commitments nor Watermaster's
12 actions are conditioned upon the additional funding. On August 1, 2000 the SAWPA Commission
13 further allocated \$87,000,000 in its project priority list for use within the Chino Basin. The final
14 allocation of Proposition 13 funding and the projects it will support shall be subject to the governors
15 and remedies contained in the Peace Agreement, subject to implementation through negotiations
16 between the Parties and independent Watermaster review of specific projects to ensure consistency
17 with the Peace Agreement and that no Material Physical Injury will result to any Party to the
18 Judgment or the Basin. The funding contingency identified in Section 3.1(b) has been fully satisfied.

19 It is true that WMWD has adopted a resolution that makes its support for the Peace
20 Agreement conditional. Its resolution does not directly contest the satisfaction of the funding
21 contingency. However, it should be noted that until an agreement between the buyers and sellers of
22 desalted water can be reached, Watermaster is informed that WMWD's support will remain
23 conditional. Watermaster continues to believe that such an agreement will be forthcoming before
24 December 31, 2000.

25 DATED: 10/26/00

HATCH AND PARENT
By 

SCOTT S. SLATER
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Attorneys for Chino Basin Watermaster

EXHIBIT A

Summary of Reallocation of Unproduced Overlying (Agricultural) Pool Safe Yield to the Appropriative Pool

FY	No.	Annual Report Apndx D	Assessment Year	Assessment Page 2	Ag Pool Production	Production Year
74/75					96,567	74/75
75/76					95,349	75/76
76/77					91,450	76/77
77/78	1st	n/a	77/78		83,934	77/78
78/79	2nd	n/a	78/79		73,688	78/79
79/80	3rd	n/a	79/80		69,369	79/80
80/81	4th	n/a	80/81		68,040	80/81
81/82	5th	n/a	81/82		65,117	81/82
82/83	6th	n/a	82/83		56,759	82/83
83/84	7th	26,354.800	83/84		59,033	83/84
84/85	8th	19,136.390	84/85	26,354.800	55,543	84/85
85/86	9th	21,901.600	85/86	19,136.390	52,061	85/86
86/87	10th	37,158.801	86/87	21,901.600	59,847	86/87
87/88	11th	78,489.402	87/88	37,158.801	57,865	87/88
88/89	12th	24,934.999	88/89	78,489.400	46,762	88/89
89/90	13th	36,037.600	89/90	24,934.999	48,420	89/90
90/91	14th	34,380.301	90/91	36,037.600	48,085	90/91
91/92	15th	34,714.700	91/92	34,380.301	44,682	91/92
92/93	16th	38,112.200	92/93	34,714.700	44,092	92/93
93/94	17th	38,707.500	93/94	38,112.200	44,298	93/94
94/95	18th	38,502.000	94/95	38,707.500	55,022	94/95
95/96	19th	27,778.300	95/96	38,502.000	43,639	95/96
96/97	20th	39,161.430	96/97	27,778.300	44,809	96/97
97/98	21st	37,990.636	97/98	39,161.430	43,345	97/98
98/99	22nd	39,455.320	98/99	37,990.636	47,538	98/99
99/00	23rd	35,262.452	¹⁾ 99/00	39,455.320	44,401	99/00
	23rd	32,800.000	²⁾ 00/01	35,262.452		00/01
			00/01	32,800.000		00/01

Note: 1983/84 was the initial year that reallocation occurred. In 1988 a transfer based on Resolution No. 88-3, appendix A was made. Thereafter transfers occurred annually based upon the formula agreed upon in Resolution No. 88-3.

84-85 corrected to reflect revised ag production due to reporting errors.

1) One time transfer per the Peace Agreement

2) Annual transfer per the Peace Agreement

PROOF OF SERVICE

FILED - West District
San Bernardino County Clerk
OCT 26 2000

FEE EXEMPT

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 October 26, 2000, I served the following:

- **POST-ORDER MEMORANDUM**
- **NINE-MEMBER BOARD ROTATION SCHEDULE TRANSMITTAL**

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 October 26, 2000.


Michelle Laffler

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FTN VALLEY CA 92728-8300

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PASADENA CA 91109-7009

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SANTA ANA RIVER WATER CO
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MIRA LOMA CA 91752-2331

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CLAREMONT CA 91711-2708

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STATE CAPITOL
ROOM NO 4066
SACRAMENTO CA 95814

BILL STAFFORD
MARYGOLD MUTUAL WATER CO
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BLOOMINGTON CA 92316-1637

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