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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.)	SPECIAL REFEREE'S
14	THE CITY OF CHINO,)	COMMENTS CONCERNING
15	Defendants.)	POST-ORDER MEMORANDUM
		Dept: 8

17 I.

18 INTRODUCTION

19 A. Background

20 On September 28, 2000, Watermaster's Motion to Amend the Judgment was granted subject
21 to the following direction: "the parties are directed to file a post-hearing brief (s) clarifying their
22 intent with respect to the Peace Agreement provisions discussed in Sections IIB through IIF in the
23 Special Referee's Report and Recommendation Regarding Watermaster's Motion to Amend
24 Judgment." (Order Concerning Motion to Amend Judgment, p. 3, Ins. 9-12.) On October 26, 2000,
25 Watermaster filed a Post-Order Memorandum addressing the Peace Agreement provisions discussed
26 in the Special Referee's Report and Recommendation Regarding Watermaster's Motion to Amend
27 (hereinafter "Report and Recommendation re Motion to Amend"). No other briefs have been filed.
28 I have reviewed the Post-Order Memorandum and make the following comments.

1 **B. Intention of the Parties**

2 The September 28, 2000 Order Concerning Motion to Amend Judgment sought clarification
3 from the parties to the Peace Agreement of their intention with respect to certain provisions
4 contained in the agreement. The Post-Order Memorandum was filed by Watermaster Counsel and
5 executed on behalf of Watermaster. Apparently it was decided that Watermaster Counsel should
6 speak for all parties to the Peace Agreement. The parties' decision not to file separate briefs
7 indicates consent to the statements of intention made in the Post-Order Memorandum.

8 **II**

9 **DISCUSSION**

10 **A. Transfers**

11 **1. Transfers by Members of the Overlying (Non-Agricultural) Pool**

12 The Peace Agreement presaged the Judgment modification sought by Watermaster with
13 respect to the Overlying (Non-Agricultural) Pool Plan, which amends the Judgment at paragraph 8
14 and Exhibit G, paragraph 6 to allow members of the Overlying (Non-Agricultural) Pool to transfer
15 or lease their quantified production rights either within the Pool or to Watermaster, in accordance
16 with procedures described in the Peace Agreement. I noted in my Report and Recommendation re
17 Motion to Amend at pages 3 and 4 that while the Peace Agreement at section 5.3 (e) includes a
18 limitation that the transfer of such rights to Watermaster is to be for the purpose of Replenishment
19 for a Desalter or for a Storage and Recovery Program, the Judgment modification does not mention
20 this limitation. I suggested that "[i]t would aid the Court in its continuing jurisdiction if the parties
21 would confirm that the proposed modification is intended to be so restricted." (*Id.* p. 4, lns. 15-16.)

22 The Post-Order Memorandum clarifies the parties' intention with respect to the Judgment
23 modification insofar as it permits transfers between members of the Overlying (Non-Agricultural)
24 Pool or to Watermaster. Watermaster confirms that the amendment is limited in its scope in that
25 "[w]hen the Transferee is Watermaster, the Transfer must be for the purpose of either: (i) Desalter
26 Replenishment or (ii) for a Storage and Recovery Program." (Post-Order Memorandum, p. 5, lns.
27 9-10.) Watermaster further explains that the Judgment modification "also incorporates all the other
28 provisions of Section 5.3 of the Peace Agreement which require Watermaster to, among other things,

1 provide advance notice of the Transfer and ensure that the Transfer will not cause Material Physical
2 Injury to any other Party to the Judgment or to the Basin.” (*Id.* at p. 6, lns. 8-11.)

3 Watermaster also clarifies that the Judgment modification reference to the Peace Agreement
4 “ensures that the life of the amendment is coterminous with the Peace Agreement. As the Peace
5 Agreement represents a compromise of a wide variety of competing claims, the Parties intend that
6 unless expressly provided to the contrary, the Parties would be returned to their relative positions
7 at the expiration of the Peace Agreement.” (*Id.*, at p. 5, lns. 16-19.) In other words, the Judgment
8 modification becomes ineffective at the end of the thirty-year term of the Peace Agreement, unless
9 the parties agree to renew the terms of the agreement. (*Id.*, at p. 5, lns. 20-21.)

10 Watermaster does not state whether the applications for transfers between members of the
11 Overlying (Non-Agricultural) Pool or to Watermaster will be made under a standard Court approved
12 process similar to the one used for applications for storage agreements, or whether each application
13 will be submitted individually for Court approval. Watermaster is in the process of preparing
14 Revised Rules and Regulations for the Basin, which should address this issue. The Revised Rules
15 and Regulations should also include the limitations discussed above with respect to transfers
16 between members of the Overlying (Non-Agricultural) Pool or to Watermaster.

17 2. Overlying (Agricultural) Pool Transfers

18 The Peace Agreement contains a provision that allows members of the Overlying
19 (Agricultural) Pool to enter into what seems to be an agency agreement with a member of the
20 Appropriative Pool to serve water to the overlying land on behalf of the Agricultural Pool member.
21 (Report and Recommendation re Motion to Amend, p. 6, lns. 21-23.) As I pointed out earlier, this
22 type of agreement is provided for in the Judgment (Judgment p. 66) only for the benefit of Overlying
23 (Non-Agricultural) Pool members, not for the benefit of members of the Overlying (Agricultural)
24 Pool. I also pointed out that, without a Judgment modification, if Watermaster is asked to approve
25 such an agency agreement it does not have the authority to do so. (*Id.* at p. 6, lns.23-28.) Finally,
26 I questioned why an agency agreement would be used when there are Judgment provisions in place
27 for the conversion of water from the Overlying (Agricultural) Pool to the Appropriative Pool. (*Id.*
28 at p.6, ln. 28 and p. 7, ln. 1.)

1 In the Post-Order Memorandum, Watermaster confirms that Section 5.3 (i) of the Peace
2 Agreement authorizes members of the Overlying (Agricultural) Pool, including the State of
3 California, to enter into agreements with an Appropriative Pool member which has a service territory
4 that includes the agricultural land or that is contiguous to the agricultural land. (Post-Order
5 Memorandum, p. 9, Ins. 16-19.) Watermaster explains that, while Section 5.3 (i) does not expressly
6 state that such agreements are subject to approval by Watermaster, all "transfers" (as that term is
7 defined in the Peace Agreement) are subject to review and approval by Watermaster "to ensure that
8 the Transfer is consistent with the Peace Agreement and does not result in Material Physical Injury
9 to any Party to the Judgment or the Basin." (*Id.* at p. 9, Ins. 21-23.)

10 Watermaster contends that, because the Judgment contemplates that Watermaster has the
11 authority to implement the Physical Solution and ensure the efficient use of water, and because the
12 Judgment contains a similar provision in the Overlying (Non-Agricultural) Pool Plan for an
13 Appropriative Pool member to serve non-agricultural overlying land pursuant to an agency
14 agreement, no Judgment modification is required to allow an Appropriative Pool member to serve
15 water to an Overlying (Agricultural) Pool member using the same type of agency agreement.
16 However, this argument only addresses whether the Judgment should specifically authorize service
17 to the Overlying (Agricultural) Pool under an agency agreement. This argument does not answer
18 the question of why an agency agreement would be used given the conversion provision in the
19 Judgment. The issue of whether there is relevant case law to support the use of an agency agreement
20 for Overlying (Agricultural) Pool service is not addressed in the Post-Order Memorandum (e.g.,
21 *Orange County Water District v. Colton*, 226 C.A.2d 642 (1964)). The Court will have to review
22 these issues when the Revised Rules and Regulations are presented for approval or when approval
23 of such an agency agreement is brought before the Court.

24 3. Conversion of Land from Agricultural Use to Urban Use

25 As I noted in my Report and Recommendation re Motion to Amend, "[a]s to members of the
26 Agricultural Pool, Judgment ¶ 8 also applies to prohibit assignment or conveyance of overlying
27 rights separate or apart from the land to which the overlying rights are appurtenant." (Report and
28 Recommendation re Motion to Amend, p. 4, Ins. 24-26.) However, the Judgment does provide a

1 “mechanism for the effective ‘transfer’ of water out of the Agricultural Pool, by reallocation of
2 unused Agricultural Pool water as provided in Judgment Exhibit H, ¶ 10 (page 73).” (*Id.*, at p. 4, lns.
3 26-28.) Under that provision any portion of the share of Safe Yield allocated to the Overlying
4 (Agricultural) Pool that is not produced in any five years may be reallocated to members of the
5 Appropriative Pool. Reallocation is also accomplished by application of the conversion provision,
6 which is explained in Appendix 1 to the 1995 Judgment Amendment.

7 I pointed out that the conversion factor was determined at a workshop conducted in January
8 1995, “by taking the 1978 agricultural water use of 84,095 acre-feet and dividing it by 32,343 acres
9 in agricultural production (the total number of agricultural acres proposed for conversion) which
10 resulted in a use of 2.6 acre-feet per acre.” (*Id.* at p. 5, lns 23-26.)

11 Watermaster proposed a Judgment amendment for the term of the Peace Agreement whereby,
12 in any year in which there is sufficient unallocated Safe Yield from the Agricultural Pool available
13 for conversion claims, “Watermaster shall allocate to each appropriator with a conversion claim, 2.0
14 acre-feet of unallocated Safe Yield water for each converted acre for which conversion has been
15 approved and recorded by Watermaster.” No modification was proposed with respect to Appendix
16 1. Because Appendix 1 is a part of the Judgment, I pointed out that Watermaster must explain the
17 basis and logic for the revision of the conversion factor. (Report and Recommendation re Motion
18 to Amend, p. 6, lns. 6-9.)

19 In the Post-Order Memorandum Watermaster explains that the Judgment modification is
20 intended to revise the conversion factor downward from 2.6 to 2.0. Watermaster asserts that the
21 basis and logic for the amendment is best understood by considering it in the context of the 1995
22 amendment to the Judgment pertaining to conversion of agricultural land to urban use. (Post-Order
23 Memorandum, p. 6, lns. 19-22.) At the time of the 1995 amendment an analysis was made which
24 determined that 2.6 acre-feet per acre was the amount of water that could reasonably be expected to
25 be made available as a result of land conversion from agricultural use to urban use. (*Id.* at p. 6, lns.
26 27-28 & p. 7, lns. 1-2.) The 1995 amendment allocated one half of the 2.6 acre-feet to members of
27 the Appropriative Pool as a whole, and the other half to the specific Appropriative Pool member that
28 was to provide water service to the land that was converted from agricultural use to urban use. (*Id.*

1 at p. 6., lns. 2-5.) Under the Peace Agreement and Judgment modification, the conversion factor is
2 revised downward from 2.6 acre-feet per acre to a more conservative allocation of 2.0 acre-feet per
3 acre. Further, instead of sharing the allocation with other members of the Appropriative Pool, the
4 entire 2.0 acre-feet is to be allocated to the member of the Appropriative Pool that will actually be
5 providing service to the converted property. (*Id.* at p. 7, lns. 6-12.)

6 According to Watermaster, the previous conversion factor resulted in 1.3 acre-feet per acre
7 of water production being moved away from where the previous production occurred, which resulted
8 in a gradual shift in substantial quantities of production out of the Southern part of the Basin (where
9 the converted acreage is located) to the Northern part of the Basin (where most of the Appropriative
10 Pool production is located). (*Id.* at p. 7, lns. 13-20.) Watermaster expects that the revised conversion
11 factor will reduce the negative impacts associated with the shift of water production associated with
12 the previous conversion factor (rising water, rejected recharge and lost yield). Watermaster further
13 expects that the revised conversion factor also will help to avert further deterioration of water quality
14 in the Basin by encouraging continued and greater production of water in the Southern portion,
15 which will protect against further build-up of salts. (*Id.* at p. 7, lns. 22-28.)

16 Watermaster has not explained, however, why it is proposed that .6 acre-feet of water be left
17 in the Southern part of the Basin, assuming the Appendix 1 calculation was accurate. This should
18 be addressed in the Revised Rules and Regulations, which should include an explanation of the
19 rationale for the downward revision of the conversion factor from 2.6 to 2.0 acre-feet per acre.

20 **4. Early Transfer**

21 I noted in my Report and Recommendation re Motion to Amend that the Peace Agreement
22 “directs the Watermaster to make a transfer in 1999-2000 of unallocated Safe Yield for fiscal year
23 1998-99 to the Appropriative Pool (35,262.452 acre-feet ‘consistent with Watermaster Resolution
24 88-3’).” (Report and Recommendation re Motion to Amend, p. 6, lns. 13-15.) I also noted that the
25 Peace Agreement provides for “Early Transfer” of 32,800 acre-feet of water per year to the
26 Appropriative Pool. I pointed out that, considering that the early transfer of 32,800 acre-feet appears
27 to be the minimum that will be transferred, it is not clear how these “Early Transfer” allocations can
28 occur and yet the Overlying (Agricultural) Pool still be entitled to pump 82,800 acre-feet (or 414,000

1 acre-feet in five years) without reduction. (*Id.* at p. 6, lns. 16-19.)

2 In the Post-Order Memorandum, Watermaster explains that the Early Transfer provision
3 “causes a minimum quantity of 32,800 acre-feet of water within the Agricultural Pool to be made
4 available for use by the Appropriative Pool. The water is a component of that portion of the Safe
5 Yield allocated to the Agricultural Pool and thus it is not a basis for modifying the Safe Annual
6 Yield of the Basin.” (Post-Order Memorandum, p. 8, lns. 7-10.) Watermaster states that the
7 historical record suggests that the members of the Overlying (Agricultural) Pool are not likely to ever
8 use its full allocation of 82,800 acre-feet per year in the future, given the transition of land from
9 agricultural to urban uses. (*Id.* at p. 8, lns. 13-14.) Instead, it appears likely that the Agricultural
10 Pool production will not exceed 50,000 acre-feet per year during the term of the Peace Agreement.
11 (*Id.* at p. 8, lns. 17-18.) Therefore, the Peace Agreement provides for Watermaster to reallocate
12 32,800 acre-feet per year to the Appropriative Pool at the beginning of each year. (*Id.* at p. 8, lns.
13 18-20.)

14 Watermaster asserts that the Early Transfer provision will provide “greater operational
15 certainty to the members of the Appropriative Pool by specifying the minimum amount of water that
16 will be Transferred each year.” (Post-Order Memorandum, p. 9, lns. 1-2.) Watermaster gives
17 assurance that the Early Transfer provision is not intended to change the allocation of Safe Yield in
18 the Judgment. (*Id.* at p. 8, lns. 3-4.) “If the early transfer of 32,800 acre-feet results in total
19 Production in excess of Safe Yield [140,000 acre-feet per year] then the Appropriative Pool will
20 correct the overproduction through means which may include incurring a replenishment obligation.”
21 (*Id.* at p. 9, lns. 4-7.) Watermaster has thus clarified that the Early Transfer provision of the Peace
22 Agreement is not intended to permit overdraft of the Basin or a modification of the Safe Yield. It
23 does not appear that this issue needs to be addressed further at this time.

24 B. Safe Yield

25 The Peace Agreement introduces the term “New Yield,” which is defined as “proven
26 increases in yield in quantities greater than historical amounts from sources of supply including, but
27 not limited to, capture of rising water, capture of available storm flow, operation of Desalters
28 (including the Chino I Desalter), induced Recharge and other management activities implemented

1 and operational after June 1, 2000.” (Peace Agreement, ¶ 1.1 (aa).) I pointed out in my Report and
2 Recommendation re Motion to Amend that there are no Judgment modifications proposed related
3 to the definition of “Operating Safe Yield” even though the Peace Agreement authorizes
4 Watermaster to include “New Yield” as a component of Operating Safe Yield under the Judgment.

5 In the Post-Order Memorandum, Watermaster asserts that the parties considered the matter
6 of modification of Safe Yield at great length and that there is a great reluctance among the parties
7 to modify the Safe Yield of the Basin without having a “robust” historical and scientific record
8 regarding recharge and production. (Post-Order Memorandum, p. 11, lns. 7-11.) Watermaster states
9 that, in theory, the members of the Appropriative Pool responsible for assuming any significant
10 replenishment obligation would have a financial incentive to recalculate Safe Yield to be a higher
11 number. (*Id.* at p. 11, lns. 12-14.) Conversely, those who are trying to increase recharge have an
12 incentive to reduce the number. (*Id.* at p. 11, lns. 14-15.) Watermaster explains that the introduction
13 of the concept of “New Yield” was designed to address this tension without requiring a formal
14 amendment to the Judgment regarding Safe Yield. (*Id.* at p. 11, lns. 16-18.)

15 Watermaster further points out that “[t]o the extent that new management methods
16 undertaken by Watermaster are proven to successfully augment the historical quantities of recharge
17 and inflow into the Basin, the definition of “New Yield” can accommodate the augmented supply
18 within the allocable Operating Safe Yield, without modifying the definition or presently estimated
19 quantity of the Safe Yield of the Basin.” (Post-Order Memorandum, p. 12, lns. 3-6.) Watermaster
20 anticipates that “given a sufficient historical and scientific record, the quantity of New Yield may
21 be included within a revised Safe Yield number in the future. However, Watermaster does not
22 anticipate such a recalculation for a period of years.” (*Id.* at p. 12, lns. 7-9.)

23 Watermaster explains that “Desalter operations do not necessarily add to New Yield.”
24 (Post-Order Memorandum, p. 12, ln. 13.) However, “[t]o the extent the location and operation of
25 the Desalters is proven to serve as an effective management tool to improve Recharge and add to the
26 yield of the Basin, it may thereby constitute ‘New Yield.’” (*Id.* at p. 12, lns. 15-17.) The Peace
27 Agreement at Section 7.5 (b) specifies that Desalter operations will incur a replenishment obligation
28 if there are insufficient supplies from sources such as New Yield. Watermaster asserts that this

1 should encourage Watermaster and the members of the Appropriative Pool to improve recharge
2 efficiency as soon as possible. (*Id.* at p. 12, lns. 19-23.)

3 I noted in my Report and Recommendation re Motion to Amend that the OBMP
4 Implementation Plan provides that the Safe Yield will be redetermined in year 2010/11 using the
5 ten-year period 2000/01 to 2009/10 (because this period will contain accurate production data and
6 groundwater level data.) Although the Post-Order Memorandum did not reiterate this point, the
7 plans for redetermination of Safe Yield should be included in the Revised Rules and Regulations for
8 the Basin.

9 C. Groundwater Storage Capacity

10 In my Report and Recommendation re Motion to Amend, I noted that the Peace Agreement
11 contains certain procedural requirements regarding Storage and Recovery Programs and Local
12 Storage. (Report and Recommendation re Motion to Amend, p. 10, lns. 14-18.) I pointed out that
13 while the Peace Agreement contemplates that storage agreements will be subject to Watermaster
14 approval, it does not address whether Court approval is required if no party seeks judicial review of
15 Watermaster's decision. (*Id.* at p. 11, lns. 10-12.) Yet, the Judgment appears to require Court
16 approval of any storage agreement. (*Id.* at pl. 12, lns. 5-7.) This was clarified in the Court's January
17 9, 1979 Order Approving the Uniform Local Storage Agreement; Amplifying and Clarifying
18 Procedures under ¶ 28 of the Judgment; Approving a Cyclic Storage Agreement. I noted: "The
19 Order [Approving the Uniform Local Storage Agreement] provides that the standard form of Local
20 Storage Agreement, as submitted and approved by the Court, may be used without further Court
21 approval in connection with the local storage of groundwater by parties to the Judgment. The Order
22 further provides that each groundwater storage agreement for cyclic and/or conjunctive use must be
23 approved individually by order of the Court before it shall become effective." (*Id.* at p. 12, lns.
24 10-14.)

25 The Post-Order Memorandum does not address the issues concerning Storage and Recovery
26 Programs and Local Storage raised in the Report and Recommendation re Motion to Amend.
27 However, the memorandum does state that the parties did not intend to alter the Court's authority
28 concerning judicial review. The Court should revisit the question of court review and approval of

1 Storage and Recovery Programs and Local Storage when the Watermaster presents the Revised
2 Rules and Regulations for approval. Presumably, Watermaster will address these issues in the
3 Revised Rules and Regulations.

4 **D. Assessments and Credits**

5 **1. General vs. Special Expenses**

6 I noted in my Report and Recommendation re Motion to Amend that the Judgment provision
7 on administrative expenses includes two categories of expenses: (i) general administrative expenses
8 and (ii) special project expenses. (Report and Recommendation re Motion to Amend, p. 12, ln. 28
9 & p. 13, lns. 1-2.) I pointed out that “[i]t is unclear from the definition provided in the Peace
10 Agreement whether the parties intend OBMP expenses to be classified as general Watermaster
11 expenses or as special project expenses.” (*Id.* at p. 13, lns. 2-4.)

12 In the Post-Order Memorandum, Watermaster states that “[t]he historical practice of the
13 parties to the Judgment, Watermaster Staff and Watermaster has been to assess all charges of general
14 benefit as a General Administrative Expense.” (Post-Order Memorandum, p. 12, lns. 26-27.)
15 Watermaster further asserts that “[t]raditionally, Watermaster has applied a practical construction
16 to these terms whereby General Expenses are equated with general benefit and Special Expenses are
17 equated with special benefit.” (*Id.* at p. 13, lns. 1-3.) “Consequently, virtually all Watermaster
18 expenses related to management of the Basin have been characterized as ‘General Expenses.’ Those
19 expenses which uniquely benefit a limited number of Producers are treated as a Special Expense.”
20 (*Id.* at p. 13, lns. 3-6.)

21 Watermaster asserts that it prefers that the majority of OBMP costs be treated as general
22 expenses because the benefits accrue “generally” to all Producers. However, some OBMP expenses
23 may be considered special expenses, to the extent that they relate to a defined problem with specific
24 remedial measures and equipment that uniquely and specially benefit one or more parties to the
25 Judgment. (Post-Order Memorandum, p. 13, lns. 7-12.) Watermaster contends that its prior
26 construction of the terms general and special expense over the past 22 years provides sufficient
27 justification to maintain the general versus special benefit distinction and classify the OBMP
28 expenses as general expenses. (*Id.* at p. 13, lns. 20-22.) However, there continues to be some

1 confusion as to what a special expense is. On page 11 of Watermaster's Draft Twenty-Third Annual
2 Report, Watermaster states: "Special projects as stated in the Judgment shall consist of special
3 engineering, economic or other studies, litigation expense, meter testing, or other major operating
4 expense. Additional special project funds are designated and budgeted as required to carry out the
5 OBMP." Obviously, the issue of general vs. special expense must be further addressed in the
6 Revised Rules and Regulations. Watermaster's construction of the terms would carry more weight
7 if it were followed consistently.

8 2. Salt Credits

9 In my Report and Recommendation re Motion to Amend, I noted that the Peace Agreement
10 introduces the concept of "Salt Credits" which is not addressed in the Judgment. (Report and
11 Recommendation re Motion to Amend, p. 13, Ins. 11-12.) "Salt Credits" is defined in the Peace
12 Agreement as "an assignable credit that may be granted by the Regional Water Quality Control
13 Board and computed by Watermaster for activities that result in removal of salt from the Basin, or
14 that result in a decrease in the amount of salt entering the Basin." I suggested that Watermaster
15 Counsel clarify whether and in what manner Salt Credits will be integrated into Watermaster
16 accounting or whether they are relevant only to Regional Water Quality Control Board ("RWQCB")
17 authority. (*Id.* at p. 13, Ins. 12-14.)

18 In the Post-Order Memorandum, Watermaster explains that the RWQCB has set limits on
19 the amount of salt that can enter the Chino Basin. (Post-Order Memorandum, p. 14, Ins. 3-4.)
20 Watermaster states that "[i]f the implementation of the OBMP reduces the amount of salt in the
21 Basin, the RWQCB may grant credits against such reduction that will allow for other activities that
22 may have otherwise been inhibited due to the regulatory limitations." (*Id.* at p. 14, Ins. 5-7.) Under
23 the Peace Agreement, Watermaster is given the responsibility of determining how these salt credits
24 will be allocated among the members of the Appropriative Pool. (*Id.* at p. 14, Ins. 7-11.) The
25 concern, of course, is that if there is a dispute over the manner in which Watermaster allocates Salt
26 Credits, there is no provision in the Judgment to aid resolution of the dispute. Watermaster should
27 address this issue in the Revised Rules and Regulations.

28 ****

1 **E. Provisions That Water Rights Be Held In Trust By Watermaster**

2 In my Report and Recommendation re Motion to Amend, I noted that the Peace Agreement
3 provides that Watermaster may own water rights in trust for the benefit of the parties to the
4 Judgment. (Report and Recommendation, p. 13- lns. 16-19.) I pointed out that there is no clear
5 authority in the Judgment for the Watermaster to acquire water rights permits, whether in trust or
6 otherwise. (*Id.* at p. 14, lns. 1-2.) I suggested that, at a minimum, Watermaster should obtain Court
7 approval to proceed to obtain water rights on behalf of the parties. (*Id.* at p. 14, lns. 3-4.)

8 Watermaster responds to the issue of its authority to hold water rights in trust as follows.
9 Watermaster points out that the overriding purpose of the Physical Solution is to provide the
10 maximum reasonable beneficial use of the waters of the Chino Basin by providing the optimum
11 economic, long-term, conjunctive utilization of surface waters, ground waters and supplemental
12 water, to meet the requirements of water users having rights in or dependent upon Chino Basin.
13 (Post-Order Memorandum, p. 15, lns. 13-15.) Watermaster also points out that there are some
14 compelling reasons for Watermaster to have the authority to acquire and hold rights in trust for the
15 benefit of the parties. For example, Watermaster's express duties include replenishing the water
16 supply by any reasonable method, including spreading, percolating, injecting and in-lieu procedures.
17 Watermaster asserts that securing water rights in trust would be a reasonable method of
18 accomplishing recharge and replenishment. (*Id.* at p. 15, lns. 25-28.)

19 Watermaster notes that there has been no opposition asserted to its holding water rights in
20 trust for the parties. But, in view of the potential concerns that might arise, Watermaster states that
21 it will submit a proposal to the Court to confirm its authority before proceeding with any application
22 to appropriate water and before taking possession of additional water rights. The issue concerning
23 Watermaster's authority to hold rights in trust will therefore be addressed in the future, when the
24 proposal is submitted to the Court.

25 **F. Definitions**

26 In my Report and Recommendation re Motion to Amend, I noted that there are several
27 additional definitions in the Peace Agreement that could affect interpretation of the Judgment, and
28 I suggested that modification of the Judgment might serve to avoid confusion. (Report and

1 Recommendation re Motion to Amend, p. 14, lns. 11-19.) Watermaster responds that the definitions
2 introduced in the Peace Agreement are not intended to conflict with any definitions included in the
3 Judgment. (Post-Order Memorandum, p. 17, lns. 15-16.) While Watermaster agrees that adding or
4 revising definitions might improve the overall understanding of the Judgment, at the present time
5 not all of the parties agree that such revisions are necessary. (*Id.* at p. 17, lns. 16-21.) Watermaster
6 further states that the Revised Rules and Regulations will present the opportunity to unify the
7 definitions in the Judgment and Peace Agreement and reconcile any perceived disjunction between
8 the definitions. (*Id.* at p. 17, 26-28.) The Revised Rules and Regulations should include a
9 cross-referencing of definitions between the Judgment and the Peace Agreement.

10 **G. Court's Continuing Jurisdiction and Judicial Review of Watermaster Decisions**

11 In my Report and Recommendation re Motion to Amend, I noted that modification of the
12 Judgment was unnecessary with respect to the Court's continuing jurisdiction, because the
13 provisions of the Peace Agreement do not purport to alter the Court's jurisdiction. (Report and
14 Recommendation re Motion to Amend, p. 14, lns. 25-27.) I further noted, however, that "the Peace
15 Agreement's silence with respect to the right of judicial review of all Watermaster decisions, actions
16 or rules could be construed as a limitation on the right to judicial review." (*Id.* at p. 15, lns. 5-7.) I
17 suggested that Watermaster clarify whether the Peace Agreement is intended to limit the parties'
18 right to judicial review. (*Id.* at p. 15, lns. 7-9.)

19 In the Post-Order Memorandum, Watermaster clarifies that the parties did not intend to
20 modify the rights to judicial review under the Judgment. (Post-Order Memorandum, p. 18, lns.
21 9-10.) Further, no amendment has been proposed to modify the Court's continuing jurisdiction. (*Id.*
22 at p.18, lns. 14-15.) Finally, while Section 9.3 of the Peace Agreement creates an obligation for the
23 Parties to pursue dispute resolution on such matters through non-binding mediation, "... emergency
24 matters and review of Watermaster actions and other matters subject to judicial review under the
25 Judgment are unaffected and are not controlled by this requirement." (*Id.* at p. 18, lns. 20-23.) It
26 does not appear that this issue need be addressed further at this time.

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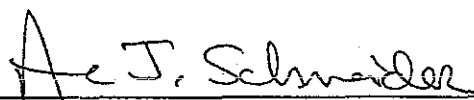
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III

CONCLUSION

The Post-Order Memorandum will provide a useful construction aid for the Court in the exercise of its continuing jurisdiction. The issue of Watermaster's authority to hold water rights in trust must be resolved when a proposal is submitted to the Court. It is expected that the following subjects will be addressed further in the Revised Rules and Regulations: (1) limitations on and judicial review procedures for Watermaster's approval of transfers by members of the Overlying (Non-Agricultural) Pool; (2) the circumstances under which an agency agreement between a member of the Overlying (Agricultural) Pool and a member of the Appropriative Pool will be considered instead of using the conversion factor; (3) the rationale for the downward revision of the conversion factor, apparently leaving .6 acre-feet of water in the Basin; (4) Watermaster's plan for redetermination of Safe Yield in year 2010/11 using the ten-year period 2000/01 to 2009/10; (5) procedures for judicial review related to Storage and Recovery and Local Storage agreements; (6) the issue of general vs. special expense; (7) the parameters under which Watermaster will consider and determine the allocation of Salt Credits; (8) a thorough cross-referencing between definitions in the Judgment and definitions in the Peace Agreement.

Dated: November 22, 2000



Anne J. Schneider, Special Referee

PROOF OF SERVICE

NOV 27 2000

By Susan King

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 November 27, 2000, I served the attached:

• **SPECIAL REFEREE'S COMMENTS CONCERNING POST-ORDER
MEMORANDUM**

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 November 27, 2000.

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Michelle Lauffer

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