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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF SAN BERNARDINO**

10 CHINO BASIN MUNICIPAL WATER
11 DISTRICT

12 Plaintiff,

13 vs.

14 CITY OF CHINO, ET AL.

15 Defendant.

Case No. RCV 51010

[Assigned for All Purposes to the
Honorable MICHAEL GUNN]

**WATERMASTER RESPONSE TO ORDER
TO SHOW CAUSE AND CONSERVATION
DISTRICT**

Hearing Date: November 29, 2007
Time: 1:30
Dept: R8

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18 On November 15, 2007, the Court issued an *Order to Show Cause Why Court Should Not*
19 *Continue The Hearing on Motion for Approval of Peace II Documents* ("OSC"). On November 19,
20 2007, the Chino Basin Water Conservation District filed a *Response of the Chino Basin Water*
21 *Conservation District* ("Conservation District") With Respect to the Chino Basin Watermaster's
22 Motion for Approval of Peace II Documents. The Conservation District's concerns center on the
23 review time provided for the Final Report, the allegation that the model may not be reliable and that
24 the prospect of additional unreplenished groundwater production *may* result from pursuing
25 Hydraulic Control.

26 As we explain below, these concerns are misplaced.

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I. Order to Show Cause

The OSC notes that the parties have made tremendous efforts to complete the Peace II process and to submit the documentation to the Court for approval well in advance of the end of the year. As the Court and all parties are well aware, failure to complete the approval process for the Peace II measures prior to the end of the year will have significant financial consequences for the members of the Appropriative Pool. In the instant case Watermaster has engaged in a lengthy open public process to obtain broad stakeholder input and obtain a broad consensus.

At a previous hearing on August 27, 2007, the Court urged Watermaster to quickly obtain a consensus or risk the consequences. As reported to the Court on November 15, each of the respective pools have now approved Watermaster's prosecution of the Peace II measures. Likewise, the Advisory Committee and the Watermaster Board unanimously approved the measures and authorized Watermaster to file the legal instruments with the Court. The documents have been vetted through legal counsel for each of the participating stakeholders to ensure the documents reflected the intention of the parties. Watermaster is unaware of any party concerns related to the form of the documentation.

Watermaster is unaware of any party that objects to any facet of the implementation of the Peace II measures. Where there is no opposition to Watermaster's proposed action and a broad consensus of all stakeholders actively support the action, the question arises as to what is Watermaster's burden of proof in requesting Court approval? Is Watermaster required to anticipate potential concerns the Court, the Referee or the Referee's assistant may have regarding elements of the program?

Resolution of these procedural questions is important because if consensus, even unanimity is insufficient to secure the Court's confidence, then the parties may ultimately spurn good faith settlement and the Watermaster process in favor of directly appealing to the Court to settle their differences. In other words, what point is there to settlement if the Court elects to require more of a party or parties than necessary to obtain consensus which has been the hallmark of the Watermaster process since 2000?

1 **II. Conservation District Response**

2 The Conservation District has responded to the OSC and the filing of the “Final” Wildermuth
3 report on November 15, 2007. The concerns are exclusively focused on the Wildermuth Final
4 Report and not the substance or the form of the Peace II legal instruments. Specifically, the
5 Conservation District has raised a number of issues most of which are largely based on
6 misunderstandings of the relationship between the Final Report and the Peace II documents.

7 **1. The Final Report Does Not Unfairly Burden Any Party or Reflect a Material**
8 **Change in Mr. Wildermuth’s Opinions.**

9 The Conservation District notes that the Final Wildermuth modeling report (“Final Report”)
10 was not submitted to the Court until November 15, 2007. This is true. However, the earlier draft
11 report was previously transmitted to the Court on October 26, 2007. Prior to that time, Mr.
12 Wildermuth had made regular and routine reports to Watermaster concerning his evaluation.

13 As the Court is aware, the process to validate the model used by Mr. Wildermuth for
14 *planning purposes* was subject to a lengthy and extensive review by Mr. Scalmanini. In March of
15 2007, Mr. Scalmanini completed his detailed review of the reliability of the Wildermuth
16 groundwater model, and opined that the model is reliable for the uses to which it is being employed.
17 (See *Review of Chino Basin Numerical Groundwater Flow Model (Updated 2003 Model)*, Luhdorff
18 & Scalmanini, March 2007, (. . . “the model can be confidently utilized . . . (p.37)”)¹; See also
19 Watermaster’s *Motion for Approval of Peace II Documents* 12:21-27.) In fact, many of the changes
20 that were made to the modeling report between the Draft version and the Final version were made
21 specifically in response to comments from Mr. Scalmanini. (*Declaration of Mark Wildermuth* dated
22 November 15, 2007 2:12-14.)

23 The Conservation District asserts that there was no summary provided as to the specific
24 changes between the draft report and the final report that would aid in the digestion of the changes.
25 This is incorrect. When the final report was submitted to the Court, Watermaster also submitted a
26 Declaration from Mr. Wildermuth which described the differences between the draft report and the
27 final report. (*Transmittal of Supplemental Documents* dated November 15, 2007, Exhibit B.) While

28 ¹ A copy of this report was previously submitted to the Court by the Special Referee in May 2007.

1 this Declaration did not detail immaterial modifications, such as typographical changes, it did
2 describe the substantive differences between the Draft and Final Reports.

3 Most importantly, as between the Draft Report and the Final Report, the conclusions that
4 Basin Re-operation is a necessary approach to achieve Hydraulic Control and that no Material
5 Physical Injury will be caused by this approach did not change. (*Declaration of Mark Wildermuth*
6 dated November 15, 2007 9:10-18; *Declaration of Mark Wildermuth* dated October 25, 2007 9:5-
7 13.))

8 **2. The Conservation District Misconstrues the Purpose of the**
9 **Wildermuth Model Analysis and Misconstrues the Authorization**
10 **Sought by Watermaster.**

11 The Conservation District states that it believes that before there can be any increase in
12 controlled overdraft beyond the 400,000 acre-feet described in the proposed Judgment amendment,
13 that there would need to be further analysis by Mr. Wildermuth and a motion filed by Watermaster
14 requesting the Court's approval of any such increase. (Conservation District Response 2:11-14.) We
15 agree. This comment actually reflects the Conservation District's fundamental misunderstanding of
16 the proposed Judgment amendment to Exhibit "I".²

17 The proposed amendment to Exhibit "I" to the Judgment (Attachment "J" to Watermaster
18 Resolution 07-05) requests that the amount of controlled overdraft authorized under the Judgment be
19 increased from 200,000 acre-feet to 600,000 acre-feet – an increase of 400,000 acre-feet. Under the
20 amended Judgment the additional amount of controlled overdraft is thus limited to 400,000 acre-feet.
21 Any increase beyond this amount would require a further Judgment amendment along with all the
22 technical analysis and process that is involved in a request for such an amendment.

23 The primary purpose of the Wildermuth evaluation of the Hydraulic Control and Basin Re-
24 Operation is set forth in the Non-Binding Term Sheet among the stakeholders. Based upon earlier
25 evaluations, concerns were raised as to whether 400,000 acre-feet of controlled overdraft may be

26 ² The Conservation District also argues that a "completely unexpected" change occurred between the
27 Draft Report and the Final Report concerning whether the 400,000 acre-feet is a minimum or a
28 maximum amount. This is incorrect. The 400,000 acre-feet of controlled overdraft was identified as
a minimum at the time of the Draft Report as reflected in Mr. Wildermuth's October 25, 2007
Declaration of Mark Wildermuth dated October 25, 2007 9:1-4.)

1 unnecessary in the event that Hydraulic Control could be secured with less unreplenished
2 production. There was a commonly held understanding among the parties and reflected in the
3 ongoing deliberations that access to the 400,000 required an expert opinion, supported by
4 Wildermuth's model evaluations that a lesser quantity would not result in Hydraulic Control.
5 Wildermuth has consistently opined that 400,000 acre-feet would be required. The Preliminary and
6 Final Report predict that at least 400,000 acre-feet will be required. However, *the model only*
7 *presents predictions for planning purposes.*

8 The proposed amendment to Exhibit "I" does not authorize taking more than the identified
9 400,000 acre-feet. If years of practical experience, on the ground observations and consistent
10 updating of the model indicate that Watermaster has successfully obtained Hydraulic Control by not
11 replenishing an amount less than 400,000 acre-feet through the authorized controlled overdraft, then
12 no further action will be required. However, if additional controlled overdraft is deemed necessary,
13 Watermaster will have to make that case at that time, with the benefit of more than a decade of
14 actual data and operating experience. Nothing in Watermaster's moving papers can be read to
15 support a request for authorization to increase the controlled overdraft by more than 400,000 acre
16 feet.

17 The fact that Wildermuth reports that the model predicts that as much as 198,000 acre-feet of
18 additional controlled overdraft may be required is a prediction based upon a set of assumed
19 conditions. Notwithstanding that prediction, 400,000 acre-feet of controlled overdraft may still be
20 sufficient in the real world. We will not know until we try. Watermaster is not asking the Court for
21 authorization to take any quantities in excess of the 400,000, and the present state of technical
22 information and the proposed amendment to Exhibit "I" would not permit it.

23 **3. Reductions in Safe Yield Predicted by the Model are Independent of**
24 **Hydraulic Control and Basin Re-Operation and May Otherwise be**
25 **Addressed in the Recharge Master Planning Effort.**

26 The Conservation District Response next notes that the model results indicate a potential
27 reduction in Safe Yield in the years ahead. The Conservation District is concerned that the Court's
28 approval of Watermaster's motion make clear that reductions in Safe Yield must be shared pro rata

1 by all Appropriators. (Conservation District Response 2:20-22.) Because this is the unambiguous
2 reading of the Judgment Watermaster agrees. However, while Watermaster will stipulate to this
3 point, we are unclear as to the relevance to the pending motion. Under the terms of the Judgment, all
4 reductions in Safe Yield must be shared by the members of the Appropriative Pool. (Judgment
5 Paragraph 44.) This has been required by the Judgment since 1978 and there has been no suggestion
6 that it should change.

7 Viewed in a broader context, this “area of concern” by the Conservation District highlights
8 an important point with regard to Watermaster’s Motion. The management of the Chino Basin is a
9 complex endeavor that involves many inter-related elements. Watermaster’s Motion presents a
10 discrete set of documents to the Court pertaining to a discrete set of issues for which approval is
11 sought. There are many other issues relevant to the Chino Basin that are not “at issue” with
12 Watermaster’s Motion per se.

13 Mr. Wildermuth’s analysis of future conditions in the Chino Basin has shown that future land
14 use changes, specifically the urbanization of the Southern end of the Basin, will result in a reduction
15 in recharge to the Basin with a corresponding reduction in Safe Yield. (*Declaration of Mark*
16 *Wildermuth* dated November 15, 2007 8:2-5, 8:15-25.) It was relevant to the accuracy of
17 Mr. Wildermuth’s modeling exercise to identify this future change, but this is independent from the
18 approvals sought by Watermaster in its Motion.

19 In fact, according to Mr. Wildermuth, it is the *Baseline Alternative* that is most problematic
20 for the Basin, and there are no reductions in yield projected for either of his Alternatives 1A and 1B
21 relative to the Baseline. (*Declaration of Mark Wildermuth* dated November 15, 2007 8:10-11.) The
22 urbanization of the Southern end of the Basin has been occurring, and will continue to occur whether
23 Watermaster’s Motion is approved or not. However, according to Mr. Wildermuth: “The potential
24 reduction in operating safe yield is worse without Re-operation.” ((*Declaration of Mark Wildermuth*
25 dated November 15, 2007 8:21.)

26 To the extent that the Conservation District’s concern can be construed as comment on the
27 long-term health of the Basin and the maintenance of Safe Yield, Watermaster acknowledges these
28 concerns. Watermaster has the power to address this and other subjects through its preparation of a

1 Recharge Master Plan. Watermaster's request for the approval of the Judgment Amendment to
2 Exhibit "T" is expressly conditioned upon the development of and continuing progress towards a
3 Recharge Master Plan.

4 **4. The Conservation District Offers No Evidence of Model Unreliability.**

5 The Conservation District identifies a change between the Draft Report and Final Report in
6 the amount of yield predicted to result as inflow from the Santa Ana River. The Conservation
7 District identifies this as, "an indication of the potential unreliability of the model and the
8 assumptions made." (Conservation District Response 3:1-3.) The unsubstantiated allegation is
9 unsupported by declaration or any other supporting evidence.

10 The allegation also misunderstands the purpose of the model and its utility for planning
11 purposes. Watermaster is using the model analysis to evaluate potential impacts and harm. It is not
12 seeking to obtain Court approvals of quantities of controlled overdraft in excess of 400,000 acre-feet
13 that may ultimately be required to secure Hydraulic Control. Watermaster would only make such a
14 request after actual evidence during historical operations suggest that a further *judgment amendment*
15 to Exhibit "T" will be required.

16 As noted above, questions regarding the reliability of the model surfaced during the public
17 review of the Peace II measures. A peer review of the model was requested in order to ensure that
18 the model was reliable, and the requirement for such a peer review was made an express condition
19 precedent in the Term Sheet. (*Stakeholder Non-Binding Term Sheet* Dated May 23, 2006 Section
20 I.C.1.) That peer review was successfully completed in March of 2007 and further improved with
21 input from Mr. Scalmanini. (*Declaration of Mark Wildermuth* dated November 15, 2007 2:15-19;
22 *Declaration of Mark Wildermuth* dated October 25, 2007 2:22-26.)

23 **5. The Expressed Concern Over Long-Term Water Supply Reliability**
24 **is Shared by Watermaster but not a Barrier to Implementing**
25 **Hydraulic Control.**

26 The Conservation District raises a concern about whether there is a long term plan in place to
27 address the uncertainty of availability of water from the State Water Project. (Conservation District
28 Response 3:4-8.) This comment misses the mark. To suggest that the unreliability of imported

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1 water somehow raises a concern with the approval of the Peace II measures, actually stands the
2 process on its head. One of the fundamental purposes and benefits of the entire Peace II process is to
3 improve water supply reliability by facilitating the use of recycled water.


4 The need to achieve Hydraulic Control is a requirement motivated in the first instance by the
5 Regional Water Quality Control Board ("RWQCB") because of commitments made by the Chino
6 Basin in the most recent amendments to the Basin Plan for the Santa Ana Watershed. (*Declaration*
7 *of Mark Wildermuth* dated October 25, 2007 7:18-21.) The reason these commitments were made
8 was to facilitate the use of recycled water in the Chino Basin. In other words, the very heart of the
9 strategy behind pursuing Basin Re-operation and Hydraulic Control is the attempt to maximize local
10 water resources in order to protect the Basin against the unreliability of imported water.

11 While it may be true that the deliveries of water to Southern California from imported
12 supplies may be subject to annual variations, the Metropolitan Water District continues to provide
13 assurances to its member agencies that it will have water to sell, including replenishment water in
14 most years. To the extent that the Conservation District's concerns can be equated to the sufficiency
15 of recharge supplies, the best place to address them will be in the context of the Recharge Master
16 Planning effort soon to be underway.

17 CONCLUSION

18 For all these reasons, as well as those presented to the Court on Thursday November 29,
19 2007 Watermaster requests the Court approve the requested Judgment Amendments and order
20 Watermaster to proceed in accordance with Resolution 07-05.

21
22
23 Dated: November 26, 2007

24 By 
25 HATCH & PARENT
26 Scott S. Slater
27 Michael T. Fife
28 Attorneys for Chino Basin Watermaster

CHINO BASIN WATERMASTER
Case No. RCV 51010
Chino Basin Municipal Water District v. The City of Chino

PROOF OF SERVICE

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, 9641 San Bernardino Road, Rancho Cucamonga, California 91730; telephone (909) 484-3888.

On November 26, 2007 I served the following:

1) **WATERMASTER RESPONSE TO ORDER TO SHOW CAUSE AND CONSERVATION DISTRICT**

BY MAIL: 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, addresses as follows:

See attached service list: Mailing List 1

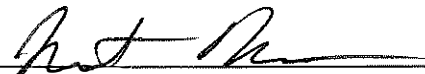
BY PERSONAL SERVICE: I caused such envelope to be delivered by hand to the addressee.

BY FACSIMILE: I transmitted said document by fax transmission from (909) 484-3890 to the fax number(s) indicated. The transmission was reported as complete on the transmission report, which was properly issued by the transmitting fax machine.

BY ELECTRONIC MAIL: I transmitted notice of availability of electronic documents by electronic transmission to the email address indicated. The transmission was reported as complete on the transmission report, which was properly issued by the transmitting electronic mail device.

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

Executed on November 26, 2007 in Rancho Cucamonga, California.



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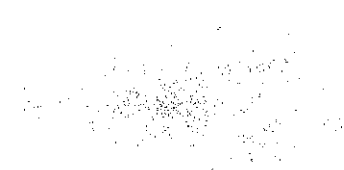
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