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4 SPECIAL REFEREE
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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN BERNARDINO, RANCHO CUCAMONGA DIVISION
10

11 CHINO BASIN MUNICIPAL WATER
DISTRICT,

12 Plaintiff,

13 v.
14

15 THE CITY OF CHINO, et al.

16 Defendants.
17

CASE NO. RCV 51010

Judge: Honorable J. Michael Gunn

SPECIAL REFEREE'S
PRELIMINARY COMMENTS AND
RECOMMENDATIONS ON MOTION
FOR APPROVAL OF PEACE II
DOCUMENTS

Date: November 29, 2007

Time: 1:30 p.m.

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I. INTRODUCTION

The purpose of this preliminary report is to set out for the court Watermaster's proposal for approval of what it calls its "Peace II Measures". Watermaster filed a Motion for Approval of Peace II Documents on October 25, 2007, with 15 main exhibits and attachments, including a draft of its technical report prepared by Wildermuth Environmental Inc.¹

The court issued an Order to Show Cause on November 15, 2007, for any and all interested parties to appear on November 29, 2007 "... to show cause why the Court should not continue the hearing on Watermaster's Motion ... to a mutually agreed upon date in early 2008, or, in the alternative, be prepared to have Mr. Wildermuth present to address the concerns of the Court as hereinbefore stated." (11/15/2007 Order to Show Cause Why Court Should Not Continue the Hearing on Motion For Approval of Peace II Documents p. 5, lns. 1-5) The court expressed concern that there may not be "sufficient time for a thorough consideration of the Motion before the end of the year" (*Id.* p. 2, lns. 10-11) and "... the technical review supporting Basin Re-operation is not yet complete" (*id.* p. 3, lns. 17-18). The court had received only a draft of the Technical Report. (A final technical report was filed with the court November 15, 2007: "2007 CBWM Groundwater Model Documentation and Evaluation of the Peace II Project Description Final Report (November 2007)" ("Final Technical Report").)

Watermaster has committed to make Mr. Wildermuth available to testify at the November 29, 2007 hearing. Testimony at the hearing may resolve or explain many of the issues and questions raised in these Preliminary Comments and Recommendations. Legal questions can probably best be addressed by Watermaster filing a comprehensive response or Memorandum of Points and Authorities, or both, following the hearing. It would be most useful if Watermaster would structure its responses to address the issues as set out in these Preliminary Comments and Recommendations.

Because of the very limited time that has been available to review so complex and

¹ The first draft Technical Report was not available until about October 24, 2007, one day before Watermaster filed its Motion. A revised draft Technical Report was made available November 10, 2007, but does not appear to have been filed with the court.

1 extensive a set of documents, and because the November 29, 2007 hearing should provide
2 explanations and answers that we hope will resolve many issues, this is a preliminary report. It
3 is anticipated at this time that a supplemental or revised Comments and Recommendations will
4 be filed with the court following the hearing, receipt of Watermaster's responses and/or
5 Memorandum of Points and Authorities, and receipt of any additional responses or memoranda
6 which may be filed by the parties.

7 **II. BACKGROUND**

8 **A. Pleadings**

9 **1. Motion for Approval of Peace II Documents**

10 Watermaster filed a Motion for Approval of Peace II Documents, on October 25, 2007.
11 The motion has three exhibits: A, B & C. Exhibit A is Watermaster Resolution No. 07-05 and
12 Attachments A – L. Exhibit B is the Draft – 2007 CBWM Groundwater Model Documentation
13 and Evaluation of the Peace II Project Description, dated October 2007 ("Draft Technical
14 Report"). Exhibit C is the Declaration of Mark Wildermuth ("Wildermuth Declaration"). The
15 documents included in Exhibits A, B & C are described as the "Peace II Documents."

16 The Peace II Documents include three proposed amendments to the Judgment, a
17 proposed amendment to the Peace Agreement, a Purchase and Sale Agreement for water from
18 the Non-Agricultural Pool, the Supplement to the OBMP Implementation Plan, the Peace II
19 Agreement, proposed amendments to Watermaster's Rules and Regulations, the Project
20 Description, and two reports from Dr. David Sunding.

21 **2. Filings in Support of Motion**

22 On November 9, 2007, Fontana Union Water Company, San Antonio Water Company,
23 and Monte Vista Water District filed Joinders to Watermaster's motion. The City of Pomona
24 filed a Statement in Support of the motion, also on November 9, 2007. On November 13, 2007,
25 Inland Empire Utilities Agency ("IEUA") filed a Joinder to Watermaster's motion and
26 Declaration of Richard Atwater. Also on November 14, 2007, the City of Chino Hills, the City
27 of Upland, the Agricultural Pool, and Cucamonga Valley Water District filed Joinders to
28 Watermaster's motion.

1 On November 15, 2007, Western Municipal Water District filed a Joinder to
2 Watermaster's motion and Declaration of John Rossi. Also on November 15, 2007, the City of
3 Ontario filed a Joinder to the motion and Declaration of Kenneth Jeske. The third filing on
4 November 15, 2007, was Three Valleys Municipal Water District's Joinder to the motion and
5 Declaration of Jeff Kightlinger. On November 26, 2007, the City of Chino filed a Joinder and
6 Statement in Support of Watermaster Motion to Approve Peace II Documents.

7 **3. Watermaster's November 15, 2007 Supplemental Transmittal of Documents**

8 The fourth filing on November 15, 2007, was Watermaster's Transmittal of Supplemental
9 Documents. Watermaster's Transmittal of Supplemental Documents includes Exhibits A –G.
10 Exhibit A is the 2007 CBWM Groundwater Model Documentation and Evaluation of the Peace
11 II Project Description, Final Report, dated November 2007 ("Final Technical Report"). Exhibit
12 B is a second Declaration of Mark Wildermuth ("Wildermuth Declaration # 2"). Exhibit C is the
13 Declaration of Kenneth R. Manning. Exhibit D is a copy of the Jeff Kightlinger Declaration
14 filed by Three Valleys Municipal Water District. Exhibit E is the Declaration of Celeste Cantu.
15 Exhibit F is a letter to Kenneth R. Manning from Robert W. Bowcock. Exhibit G is the
16 Declaration of Mark Kinsey.

17 **4. Other Filings**

18 On November 19, 2007, the Chino Basin Water Conservation District filed a Response to
19 Watermaster's motion, supporting a continuance of the motion to some time in early 2008. On
20 November 26, 2007, Watermaster filed a Response to the Conservation District's comments.

21 **B. History of the Peace Agreement Process and the Court's Orders Regarding**
22 **Desalters**

23 **1. Adoption of OBMP and Peace Agreement**

24 In February 1998, Watermaster was directed to prepare an Optimum Basin Management
25 Program for Chino Basin (OBMP). The OBMP was divided into two phases. The first phase
26 was the adoption by the Advisory Committee and Watermaster of the Phase I Report, dated
27 August 19, 1999. The second phase was the adoption of an Implementation Plan. (Order
28 Concerning Adoption of OBMP, dated July 13, 2000, p. 2.) Together, the two documents (Phase

1 I Report and Implementation) constitute the OBMP. (*Id.* at p. 3) In June 2000, Watermaster
2 adopted the goals and plans of the Phase I Report, consistent with the Implementation Plan and
3 Peace Agreement. (*Ibid.*)

4 **2. Development of Peace II Documents**

5 In 2004, the parties began conducting a five-year review of OBMP implementation.
6 (Motion p. 3) A list of issues to be addressed was formulated and the parties commenced to
7 negotiate an update to the Peace Agreement. (*Id.* at p. 5) After additional technical work was
8 completed and public workshops held, a Non-Binding Term Sheet was developed. (*Id.* at p. 6)
9 The Term Sheet was presented to the pools, the Advisory Committee, and finally to the Board
10 for approval. (*Id.* at p. 7) Ultimately, the Peace II documents were developed and submitted to
11 the Court for approval.

12 **III. TECHNICAL ANALYSIS OF BASIN REOPERATION**

13 **A. Hydraulic Control and Basin Reoperation Concepts**

14 At least as early as during the preparation of the OBMP, it has been recognized that
15 development in the Basin and associated changes in land use, most notably the progressive
16 decline in agricultural land use and an associated decline in groundwater pumping in the
17 southern part of the Basin, would contribute to rising groundwater levels and an increase in
18 groundwater outflow toward the Santa Ana River, resulting in a decrease in the safe yield of the
19 Basin. Based on that recognition, an objective in managing the Basin has been to retain pumping
20 in the southern part of the Basin as agricultural land use declines. However, as municipal water
21 requirements have increased while agricultural water requirements have decreased, it has also
22 been recognized that groundwater quality in the southern part of the Basin constrains the simple
23 conversion of groundwater pumping in that area from agricultural to municipal supply. The
24 solution to retaining pumping in the southern part of the Basin and making use of that pumping
25 for municipal supply has thus far involved the installation of a network of wells and desalter
26 facilities that remove or otherwise exchange dissolved minerals (salt) and produce water quality
27 that can be used for municipal supply.

28 Concurrent with the ongoing increase in municipal water requirements in the Basin, it has

1 been recognized that there is an increasing amount of treated wastewater that could be recycled
2 for a number of uses in the Basin, most notably for non-potable water supply and for
3 groundwater recharge. However, the Basin Plan adopted by the Santa Ana Regional Water
4 Quality Control Board (“RWQCB”) had established groundwater quality goals for the Basin that
5 could not be achieved if recycled water were used for groundwater recharge; in other words, the
6 groundwater basin lacked the assimilative capacity to receive recycled water, with its dissolved
7 mineral concentrations, without exceeding the groundwater quality goals in the Basin Plan. To
8 solve that constraint, Watermaster and the RWQCB negotiated revisions to the Basin Plan
9 whereby recycled water could be used in the Basin, for non-potable and groundwater recharge
10 purposes, as long as pumping in the southern part of the Basin were configured and operated in a
11 way that would “protect” downgradient water quality, most notably in the Santa Ana River and
12 Prado basin area. The concepts of hydraulic control and basin reoperation derive directly from
13 the configuration and operation of pumping in the southern part of the Basin to achieve that
14 “protection”.

15 In summary, hydraulic control is simply the continuation of a certain amount of
16 groundwater pumping in the southern part of the Basin, nominally about 40,000 acre-feet per
17 year (“afy”), intended to be sufficient to avoid the recovery of groundwater levels as agricultural
18 pumping declines and to thus avoid increases in groundwater outflow that would contribute to a
19 decrease in safe yield, combined with the operation of desalters to manufacture water quality that
20 can be beneficially used for municipal water supply. The “control” nature of hydraulic control
21 derives from the purposeful placement and operation of wells in the southern part of the Basin to
22 sufficiently lower groundwater levels to intercept groundwater that flows southerly from the
23 Chino North Management Zone (that area generally north of the desalter well field) rather than
24 let it discharge to the Santa Ana River and Prado basin area. The “reoperation” concept simply
25 involves the planned purposeful removal of groundwater from storage to achieve the lowering of
26 groundwater levels to accomplish hydraulic control. Reoperation also recognizes that the
27 purposeful removal of groundwater from storage, and the associated lowering of groundwater
28 levels, will set up a hydraulic condition whereby surface water in the Santa Ana River will be

1 induced to recharge the Chino Basin, upstream of the Prado basin area. That induced recharge
2 has been termed “new yield”, in that it represents a new component of recharge that potentially
3 adds to the overall yield of the Chino Basin.

4 **B. Previous Technical Work and Review of Watermaster Models**

5 For many years, extensive technical work has been conducted to conceptually describe
6 and technically analyze the Chino Basin. Of note in recent years have been the development and
7 application of a numerical groundwater flow model (Watermaster’s 2003 Model) to analyze the
8 then-proposed Dry Year Yield Program (DYYP) in 2003, followed by an updating of that model
9 (Watermaster’s Updated 2003 Model) and use of it for planning level analyses of future
10 hydraulic control alternatives in 2006, followed in turn by the development and use of an
11 Updated 2007 Model for analysis of a Baseline and two similar reoperation alternatives in
12 support of Watermaster’s current Motion for approval of its proposed Peace II Documents. The
13 Final Technical Report includes documentation of the 2007 Model.

14 After extensive increases in monitoring, installation of new dedicated monitoring wells,
15 interpretation of subsurface drilling and logging data, very detailed investigation of subsidence-
16 related issues in MZ-1, and other efforts related to implementation of the OBMP over the last
17 several years, the 2007 Model is reported to reflect the most complete conceptualization of the
18 Basin and its boundary conditions, and to simulate historical basin conditions very well. It is
19 thus presented by Watermaster to be the most sophisticated tool with which to analyze
20 alternatives from which to select an “optimum” Basin operation strategy. This model should be
21 able to answer important questions discussed in these Preliminary Comments and
22 Recommendations, including such tasks as: use of the model for “optimization”, assessment of
23 any alternatives to the proposed strategy, consideration of when hydraulic control would be
24 accomplished, analysis of whether timely replenishment of unachieved “new yield” would
25 interfere with the formation of hydraulic control, and analysis of whether replenishment of about
26 200,000 af additional overdraft (above the requested 400,000 af) after 2030 would affect
27 maintenance of hydraulic control.

28 Watermaster obtained peer review of its updated 2003 Model by Joe Scalmanini.

1 (“Review of Chino Basin Groundwater Flow Model ‘Updated 2003 Model’” (March 2007).)
2 Watermaster’s Motion implies that the “newly updated [2007] model” was peer reviewed. That
3 is not the case, although Mr. Scalmanini and Mr. Wildermuth have continued and are continuing
4 to consult on the 2007 Watermaster Model as directed by the court. (5/24/2007 Order)
5 Watermaster’s Motion notes that, based on collaboration with Mr. Scalmanini and “upon the
6 recommendations in the Scalmanini Model Review Report”, Mr. Wildermuth “performed
7 additional refinements to the model in order to improve its predictive power and the overall
8 confidence in the model results.” (Motion p. 13, Ins. 1-3) There has been no “verification” of
9 the 2007 Model by Mr. Scalmanini, contrary to Watermaster’s statement, however. Attachment
10 1 to these Preliminary Comments and Recommendations is a brief technical memorandum
11 prepared by Mr. Scalmanini that addresses model-related analyses pertinent to model review and
12 interpretation of the Final Technical Report, and compares certain 2007 Model results with
13 previously reported results. (“Summary of Model-Related Analyses Pertinent to Interpretation of
14 Final CBWM Technical Report”, November 26, 2007)

15 **C. Technical Work in Support of Basin Reoperation**

16 **1. Importance of Technical Report for Basin Reoperation**

17 Watermaster’s Motion stresses the importance of its technical work and its foundational
18 conceptualization and computer model. Watermaster has undertaken extensive technical
19 analysis to evaluate the concept of Basin reoperation. “The development of the policy aspects of
20 Basin Re-operation were guided at every step by the highest level of technical analysis . . .”

21 (Motion p. 7, Ins. 6-7) Watermaster has confidence in its model:

22 The Basin Re-operation strategy was developed using the results of the Chino
23 Basin groundwater flow model. The computer model of the Chino Basin has been
24 under development for many years and has evolved into a sophisticated computer
representation of the Basin. Over the years its results have been ground-truthed
against actual monitoring data.

25 (Motion p. 12, Ins. 4-7) The model and Final Technical Report are of the utmost importance to
26 Watermaster:

27 Perhaps the most important document that has been submitted to assist the Court
28 is the technical review of the Basin Re-operation Strategy that has been prepared
by Wildermuth Environmental . . .

1 (Id. p. 10, Ins. 1-3)

2 **2. Watermaster Relies on Technical Report “Findings” of No Material Physical**
3 **Injury**

4 Watermaster’s Motion states that Watermaster, based on the Technical Report:

5 . . . has determined that the Basin Re-operation strategy as described in the Project
6 Description is a beneficial strategy to the Basin that will advance the OBMP goals
7 of yield enhancement and protection. . . Furthermore, the implementation of the
8 Basin Re-operation strategy will not result in Material Physical Injury [citing
9 Exhibit “C” Declaration of Mark Wildermuth].

10 (Motion p. 13, Ins. 12-17) The Peace Agreement contractual standard of “Material Physical
11 Injury” is the criterion that is applied:²

12 Based on my knowledge of the Chino Basin and the analysis obtained from the
13 use of the 2007 Model, it is my professional opinion that the Basin Re-operation
14 strategy as described in the Project Description will not cause Material Physical
15 Injury.

16 (Wildermuth Declaration p. 9, Ins. 11-13)

17 The conclusion that neither basin reoperation itself nor any of the consequences of basin
18 reoperation will cause “Material Physical Injury” are based on subjective analysis:

- 19 • Although increases in pump lift (lower water levels) are specifically called out as
20 “Material Physical Injury” in the Peace Agreement definition, the Technical Report states
21 there is no Material Physical Injury even though water levels will be lowered throughout
22 the basin and water levels in certain areas will drop by over 100 feet.³

23 ² Peace Agreement Section 1.1(y) defines “Material Physical Injury” as follows:

24 “Material Physical Injury” means material injury that is attributable to the Recharge, Transfer,
25 storage and recovery, management, movement or Production of water, or implementation of the
26 OBMP, including, but not limited to, degradation of water quality, liquefaction, land subsidence,
27 increases in pump lift (lower water levels) and adverse impacts associated with rising groundwater.
28 Material Physical Injury does not include “economic injury” that results from other than physical
causes. Once fully mitigated, physical injury shall no longer be considered to be material;

³ “From a production perspective, no Material Physical Injury is projected to occur from the declining groundwater
levels caused by Alternatives 1A and 1B.” (Wildermuth Declaration p. 6, Ins. 1-2) Further:

The projected groundwater elevation changes are not uniform across the basin, and therefore some
water agencies will experience greater lift and related energy expenses from Re-operation. That
said, the parties to the Judgment have indicated that they are willing to accept an increase in
energy expenses with the expectation of other financial gains and certainties made possible by
implementing the Peace II project description and other Peace II related agreements. Therefore, no
material physical injury is projected to occur from the decline in groundwater levels caused by
Alternatives 1A and 1B. In all cases, groundwater production is projected to be maintained in

- Safe yield declines significantly for both the Baseline and reoperation alternatives, but there is no Material Physical Injury because the Baseline is “worse” than Alternatives 1A and 1B.⁴
- Changes in groundwater levels caused by reoperation alternatives will “likely” result in “broad-scale, small subsidence caused by the regional lowering of groundwater levels . . .”, but that is not Material Physical Injury.⁵
- Maintaining a “weak” state of hydraulic control with the Baseline Alternative would result in material physical injury, but maintaining a “robust” state of hydraulic control with the reoperation alternatives would not result in material physical injury, even though the “weak” versus “robust” criterion is subjective and has neither technical nor regulatory (RWQCB) bases.⁶

IV. PROPOSED JUDGMENT AMENDMENTS

A. Proposed Amendment to Judgment Exhibit “I” (Engineering Appendix)

1. Watermaster’s Motion

Watermaster’s Motion asks the court to review proposed Judgment amendments under

Alternatives 1A and 1B although some changes in production and replenishment plans may be required.

(Wildermuth Declaration #2 p. 5, Ins. 20-27)

⁴ “The safe yield in the Chino Basin is projected to decrease for the Baseline Alternative and Alternatives 1A and 1B. The safe yield decreases at a slower rate in Alternatives 1A and 1B than the Baseline Alternative. Alternatives 1A and 1B result in an increase in safe yield relative to the Baseline Alternative. . . There are no reductions in yield projected for Alternatives 1A and 1B relative to the Baseline Alternative; thus, there is no material injury related to safe yield changes. The safe yield changes associated with Alternatives 1A and 1B are consistent with the goal of the OBMP to protect and enhance the safe yield of the Basin.” (*Id.* p. 7, Ins. 26-28, p. 8, Ins. 1, 10-13)

⁵ “My analysis found that there will be no new inelastic subsidence in the managed area of Management Zone 1 in the Baseline Alternative and Alternatives 1A and 1B. East of managed area of Management Zone 1 there will likely be some broad-scale, small subsidence caused by the regional lowering of groundwater levels that should not pose challenges to either surface structures or underground utilities. There should be no Material Physical Injury due to subsidence from the change in groundwater levels caused by Alternatives 1A or 1B.” (*Id.* p. 8, Ins. 23-28)

⁶ “My analysis found that it may be possible to achieve a weak state of Hydraulic Control under the Baseline Alternative where the state of hydraulic control is not robust and could be lost at any time due to a variety of changes in Basin conditions such as changes in groundwater pumping, replenishment, and groundwater storage. A weak state of hydraulic control or non-attainment of hydraulic control could result in the loss of the maximum benefit objectives and subsequently either the loss of the use of recycled water in the basin or cause the cost of recycled water use to be increased substantially to levels that would prohibit its use relative to imported water. The Baseline Alternative will result in Material Physical Injury to the parties. Alternatives 1A and 1B result in significantly greater reductions in groundwater levels in the Chino Creek Wellfield and a reliable state of hydraulic control. Under this evaluation criterion no Material Physical Injury would occur with Alternatives 1A or 1B.” (*Id.* p. 7, Ins. 14-25)

1 Judgment Paragraph 15. (Motion p. 8, lns. 10-11) Watermaster seeks court approval of the
2 amendment to Exhibit ‘I’ of the Judgment “as presented.”⁷ (*Id.* p. 22, ln. 25) The proposed
3 Judgment Exhibit “I” amendment is Attachment “J” to Watermaster’s Resolution 07-05, which
4 resolution is, in turn, Exhibit “A” to Watermaster’s Motion. Watermaster’s Motion makes only
5 the following statements with regard to the proposed Judgment Exhibit “I” amendment:

6 Attachment “J” is a proposed Judgment amendment that will authorize
7 Watermaster to initiate the Basin Re-operation strategy.

8 (*Id.* p. 8, lns. 8-9)

9 The Peace II document that is most relevant to the issue of Basin Re-operation is
10 the proposed amendment to Exhibit “I” of the Judgment. This document is
11 Attachment “J” to Resolution 07-05, and is the central document for which
12 Watermaster seeks Court approval.

13 (*Id.* p. 11, lns. 15-17)

14 Of foremost importance for the Court’s analysis, the proposed amended Exhibit
15 “I” specifies that the additional 400,000 acre-feet of controlled overdraft will be
16 dedicated exclusively for the purpose of Desalter replenishment. (Proposed
17 Amended Judgment Exhibit “I” section 2.(b)[3].)

18 (*Id.* p. 14, lns. 1-3)

19 The proposed Judgment amendment regarding Re-operation describes measures
20 that will be taken in order to continually update and implement the Recharge
21 Master Plan in order to ensure that sufficient recharge capacity exists in the future
22 ...”

23 (*Id.* p. 15, lns. 23-25) Watermaster’s Motion does not further discuss the proposed Judgment
24 Exhibit “I” amendment.

25 **2. Proposed Amendment Would Authorize Overdrafting the Basin**

26 The amendment would direct Watermaster to “secure and maintain Hydraulic Control”
27 through “controlled overdraft” by allowing the Basin to be overdrafted by 600,000 acre-feet
28 instead of the 200,000 acre-feet of overdraft currently authorized by the “Operating Safe Yield”
provisions in Exhibit “I” Paragraph 3 of the Judgment. (Motion Exh. A, Attachment “J”, ¶ 2(b))
The additional 400,000 acre-feet of groundwater produced through the “controlled overdraft” for

⁷ Watermaster does not provide a redline version of Exhibit “I”. The proposed changes are comprised of the addition of a new paragraph 2. Existing paragraph 2 is renumbered paragraph 3, and existing paragraph 3 is renumbered paragraph 4.

1 “re-operation” is to be “. . . made available under the Physical Solution for the express purpose
2 of satisfying some or all of the groundwater production by the Desalters until December 31, 2030
3 (“Period of Re-Operation”).” (*Id.* at ¶ 2(b)[3]) The amendment allows the “controlled
4 overdraft” of 400,000 acre-feet to continue even if Hydraulic Control is “secured in any year
5 before the full 400,000 acre-feet has been Produced without Replenishment”, subject to certain
6 requirements. (*Id.* at ¶ 2(b)[6]) The amendment would not, however, authorize more than the
7 additional 400,000 acre-feet of “cumulative un-replenished Production”.

8 **3. The Proposed Judgment Exhibit “I” Amendment is Not Supported by the**
9 **Technical Report**

10 The proposed amendment to Judgment Exhibit “I” is not supported by the Technical
11 Report. The Technical Report states that 198,000 to 212,000 acre-feet more than the additional
12 400,000 acre-feet (i.e., approximately an additional 600,000 acre-feet) will be the actual
13 cumulative overdraft by 2030.⁸ Because what the Technical Report calls “new Santa Ana River
14 recharge” “. . . never reaches the assumed constant recharge in Table 7-6a and Table 7-6b”, there
15 is a “shortfall”:

16 The result of this shortfall is a reduction in storage by 2029/30 of about 198,000
17 acre-ft/yr and 212,000 acre-ft/yr for Alternatives 1A and 1B, respectively, above
18 the 400,000 acre-ft provided by Re-operation. This shortfall in induced recharge
19 should be mitigated preferably after 2030 to ensure that hydraulic control is
20 achieved as soon as possible.

19 (Technical Report pp. 7-13) The Declaration of Mark Wildermuth restates this point:

20 The result of this shortfall in Santa Ana River recharge is a reduction in storage in
21 excess of the 400,000 acre-ft provided for in the Re-operation schedules.

22 (Declaration of Mark Wildermuth p 5, Ins. 11-12) Without specifically acknowledging this
23 “shortfall”, Mr. Wildermuth states:

24 _____
25 ⁸ The Technical Report states that the “shortfall” of 198,000 to 212,000 acre-feet by 2029/30 is “reduction in
26 storage”. It is not clear whether the 400,000 af is unreplenished production (also sometimes still referred to in
27 Watermaster’s documents as “forgiveness” of replenishment assessments), or whether the 400,000 is also reduction
28 in groundwater storage. In any event, substantially more than 400,000 acre-feet will be removed from groundwater
storage by 2030, according to the Technical Report, if Watermaster follows the Attachment “E” schedules for
Reoperation Alternatives 1A and 1B. In Appendix “F” of the Technical Report, cumulative declines in storage for
Alternatives 1A and 1B with the Dry Year Yield Program between 2006 and 2030 are 610,000 and 660,000 acre-
feet.

1 The model analysis has shown that to reliably achieve Hydraulic Control, at least
2 400,000 acre-feet of controlled overdraft will be necessary. This amount is a
3 minimum amount that will be needed. It is possible that in the future we may
4 determine that additional controlled overdraft is necessary.

5 (*Id.* p. 9, Ins. 1-4; emphasis added)

6 Watermaster's Motion does not discuss the Technical Report with regard to this issue; it
7 does not address this issue at all. If the Technical Report is correct, it appears that Judgment
8 Exhibit "I" would have to be amended to allow more than 600,000 acre-feet – not 400,000 acre-
9 feet – of additional overdraft; alternatively, the initial schedules in the Attachment "E" tables
10 would have to be revised to reflect corrected New Yield numbers.

11 Tables 7-6(a) and 7-6(b) are duplicates of Attachment "E" to Watermaster Resolution
12 07-05. The Motion does not refer to Attachment "E" (although it at least mentions every other
13 attachment and exhibit). Table 7-6(a)⁹ shows how the Re-Operation "Balance" of 400,000 acre-
14 feet is credited against desalter pumping. It includes "New Yield" as an additional credit against
15 desalter pumping, with "New Yield" ranging from 8,610 acre-feet in 2006/07 to 11,820 acre-feet
16 in 2029/30. It is assumed that "New Yield" will be available at a constant rate equal to thirty
17 percent of the desalter pumping rate.

18 Figure 7-7 shows the delayed inducement of "new yield". "New yield" does reach an
19 average of about 9,000 acre-feet per year, but not until 2039/40 through 2059/60. Figure 7-7
20 shows that there is no "new yield" at all until almost 2015, and that it doesn't approach 4,000 afa
21 until after 2020, and 6,000 afa until about 2025. The Technical Report notes that ". . . it [new
22 yield] never reaches the assumed constant recharge [11,820 afa] assumed in Table 7-6(a) and
23 Table 7-6(b)." (Technical Report pp. 7-13; emphasis added)

24 As a result of the Technical Report's conclusion that "new yield" does not yet exist and
25 will build up gradually after 2015 to only about 9,000 afa, the Table 7-6(a) credit for "new yield"
26 against desalter pumping is significantly overstated.¹⁰ "New yield" never reaches the 11,820 afa

27 ⁹ Table 7-6(a) shows desalter replenishment quantities for 2006/07 through 2029/30 with "Most Rapid Depletion of
28 the Re-Operation Account". Table 7-6(b) assumes "Proportional Depletion of the Re-Operation Account". The
"New Yield" quantities are the same in both. Peace II Agreement § 7.2(e)(i) says an "initial schedule" was to be
submitted to the Court along with Res. 07-05. Res. 07-05 indicates that these tables are the "schedule".

¹⁰ Watermaster assumed from 2000/01 through 2004/05 that 50 percent of desalter pumping was replenished by

1 assumed in Table 7-6(a) and, consequently, there is a “shortfall” in water to credit against
2 desalter pumping:

3 The result of this shortfall is a reduction in storage by 2029/30 of about 198,000
4 acre-ft/yr and 212,000 acre-ft/yr . . . above the 400,000 acre-ft provided by Re-
5 operation. This shortfall in induced recharge should be mitigated preferably after
6 2030 to ensure that hydraulic control is achieved as soon as possible.

6 (*Id.*, emphasis added)

7 **4. “Mitigation” for More Than 200,000 Acre-Feet of Additional Overdraft Is**
8 **Not Addressed**

9 Other than the sentence quoted above, there is no discussion in the Technical Report of
10 what “mitigation” would or could be. If Watermaster proposes to “mitigate” all or part of the
11 more than 200,000 af reduction in storage after 2029/30, any such “mitigation” should be
12 described, fully analyzed, and included in planning for new recharge capacity.

13 **5. Revising the Attachment “E” Initial Schedule Will Not Necessarily Remedy**
14 **this Problem**

15 One response that Watermaster may make is to simply revise the Attachment “E” tables
16 to reduce the “New Yield” quantities to be consistent with the Technical Report. There is no
17 technical or modeling analysis, however, that shows that mining 400,000 acre-feet without
18 reducing groundwater in storage by 198,000 to 212,000 additional acre-feet would achieve the
19 “robust” Hydraulic Control which Mr. Wildermuth has declared to be necessary.¹¹ It is also not
20 clear from Watermaster’s Motion or the Peace II documents that the parties have based their
21 unanimous agreement on any version of the “Schedule” other than the version set forth in the
22 Attachment “E” tables.

23 **6. The Proposed Recharge Plan and Contingency Plan Provisions of the**
24 **Proposed Amendment to Judgment Exhibit “I” Do Not, as Written, Provide**
25 **the Intended Assurances**

26 Watermaster’s Motion states that the parties recognize that:

27 “new yield”, and assumed 30 percent since 2005/06. (Technical Report Table 7-3) Watermaster accounting should
28 be revised to reflect Technical Report Figure 7-7.

¹¹ See discussion, below, at Section VI.E.

1 . . . at the end of the period of Basin Re-operation, a replenishment obligation
2 relative to the desalters will need to be satisfied.¹² During the period of Re-
3 operation demands on the Basin will continue to grow, and at the end of the Re-
4 operation period Watermaster's recharge capabilities may not be sufficient to
5 meet the desalter replenishment obligation unless this recharge capacity continues
6 to develop throughout the Re-operation period. The proposed Judgment
7 amendment regarding Re-operation describes measures that will be taken in order
8 to continually update and implement the Recharge Master Plan in order to ensure
9 that sufficient recharge capacity exists in the future, and these commitments are
10 further mirrored in the Peace II Agreement Article VIII.

11 (Motion p. 15, Ins. 17-26)

12 The measures to be taken are set forth in Paragraphs 2(b)(5) and (6) of the proposed
13 Judgment Exhibit "I" amendment. Paragraph 2(b)(5) commits Watermaster to update its
14 Recharge Master Plan, and obtain court approval of updates. The plan will apparently be the
15 document which will define the otherwise undefined "new equilibrium"¹³ to be reached:

16 (5) Watermaster will update its Recharge Master Plan and obtain court approval
17 of its update, to address how the Basin will be contemporaneously managed to
18 secure and maintain Hydraulic Control and operated at a new equilibrium at the
19 conclusion of the period of Re-operation. The Recharge Master Plan shall
20 contain recharge projections and summaries of the projected water supply
21 availability as well as the physical means to accomplish recharge projections.
22 The Recharge Master Plan may be amended from time to time with court
23 approval.

24 Watermaster does not include any deadlines for submittal of an updated Recharge Master
25 Plan to the court for approval.

26 The critical question is what happens if Watermaster either does not further carry out its
27 recharge planning process or does not implement the plan. Paragraph 2(b)(6) is obviously meant
28 to answer that question. It misses the mark, however, since it is not reflective of a key
conclusion in Watermaster's Technical Report. The Technical Report concludes that 400,000
acre-feet is the minimum amount of controlled overdraft that will be needed. Paragraph 2(b)(6)
links the remedy of "suspension" of the 400,000 acre-feet of controlled overdraft with Hydraulic
Control being "secured" before the full 400,000 acre-feet is mined. The Technical Report now

¹² Watermaster will have a replenishment obligation well in advance of the "end of the period of Basin Re-operation".

¹³ See discussion, below, at Section VI.F.

1 says that that will not happen.

2 Watermaster should consider amending Paragraph 2(b)(6). One possible approach is
3 shown in redline:

4 (6) Re-Operation and Watermaster's apportionment of controlled overdraft in
5 accordance with the Physical Solution will not be suspended ~~in the event that~~
6 ~~Hydraulic Control is secured in any year before the full 400,000 acre feet has~~
7 ~~been Produced without Replenishment~~, so long as (i) Watermaster has prepared,
8 adopted and the Court has approved a contingency plan that establishes
9 conditions and protective measures that will avoid unreasonable and unmitigated
10 material physical harm to a party or to the Basin and that equitably distributes the
11 cost of any mitigation attributable to the identified contingencies; and (ii)
12 Watermaster is in substantial compliance with a Court approved Recharge Master
13 Plan.

10 Of course, Watermaster may chose to pursue a different approach.

11 There are additional questions raised by Paragraph 2(b)(6). One obvious question is what
12 is a "contingency plan" and how would it differ from the Recharge Master Plan? The
13 "contingency plan" seems to be a form of mitigation plan, but only applies where there is
14 "material physical injury" (which Watermaster asserts will not occur with Basin Reoperation).
15 Under the "contingency plan", the costs of "any mitigation attributable to the identified
16 contingencies" must be "equitably" distributed. What does any of this mean? Watermaster
17 should fully explain the meaning and purpose of Paragraph 2(b)(6)(i) to make it possible to
18 evaluate whether it would be efficacious and whether it should be added to the Judgment.

19 Another question is what "substantial compliance" means in Paragraph 2(b)(6)(ii). Will
20 the court determine if this standard is being met? If Watermaster were not in "substantial
21 compliance, would "controlled overdraft" stop (be "suspended")? What would stopping or
22 "suspension" mean, in practical terms? Would the court be able to determine that "controlled
23 overdraft" had stopped or been suspended? In other words, is there a clear and enforceable
24 obligation here? Watermaster should answer these questions.

25 The assurances in Paragraphs 2(b)(5) and (6) are focused solely on the need in the future
26 to satisfy the "replenishment obligation relative to the desalters". Watermaster, however, has the
27 obligation to levy and collect sufficient assessments to replace production in excess of Safe Yield
28 or Operating Safe Yield. (Judgment ¶ 22, Exhibit "F" ¶ 7, Exhibit "G" ¶ 5, Exhibit "H" ¶ 7) The

1 Technical Report struggles with the parties' forecasted demands, and constrains future pumping
2 because recharge capacity is constrained. If pumping demands continue to increase as projected,
3 recharge capacity will have to increase (or pumping will have to be constrained). In any event,
4 Watermaster's recharge master planning must logically take into account all necessary future
5 recharge needs, not just recharge for desalter pumping. Given the projected substantial decline
6 in Safe Yield, Watermaster's ongoing "evaluation" should comprehensively assess recharge
7 needs and evaluate the feasibility of maintaining Safe Yield.

8 **B. Proposed Amendment to Judgment Paragraph 8 (Overlying Rights)**

9 **1. Watermaster's Motion**

10 Watermaster's Motion asks the court to approve the amendment to Judgment Paragraph 8
11 "as presented".¹⁴ (Motion p. 22, ln. 2) The proposed Judgment amendment is Attachment "H"
12 to Watermaster's Resolution 07-05. The Motion states:

13 The subject matters of Attachments "H" and "I" concern efforts to address the
14 problem of continued underutilization of Non-Agricultural Pool rights by
allowing additional transferability options.

15 (Motion p. 8, lns. 5-7)

16 Watermaster's Motion explains that the proposed Judgment Paragraph 8 amendment is
17 one of three elements related to the transfer of water from the Overlying (Non-Agricultural)
18 Pool. The Motion explains that the intention is to allow a "one time transfer" of water in
19 carryover storage accounts and an ongoing annual transfer of Overlying (Non-Agricultural) Pool
20 water:

21 There are two different transfers [of water from the overlying non-agricultural
22 pool] at issue – the one time transfer of the water held in storage, and the ongoing
23 transfer to the Appropriative Pool. The former requires a Judgment Amendment,
and the latter is done under the Peace Agreement [Resolution 07-05 Attachment
24 "G" Purchase and Sale Agreement], though the latter also requires a Judgment
Amendment in this instance because it is contemplated that the transferred water
may be distributed to the Appropriative Pool members.

25 (*Id.* p. 16, lns. 20-25)¹⁵

26 _____
27 ¹⁴ Watermaster does not provide a redline version of Paragraph 8. The proposed change is to add the alternative
disposition of water under (iii).

28 ¹⁵ This statement is confusing. It suggests that the "one time transfer" requires a Judgment amendment (Paragraph 8
presumably), and that the "ongoing [annual] transfer to the Appropriative Pool" also requires a Judgment

1 The Motion offers no explanation of the need for the Judgment Paragraph 8 and Exhibit
2 “G” amendments other than that there is:

3 . . . water currently held in storage by the Non-Agricultural Pool [and] there is
4 currently a yearly surplus of water from this Pool that could be put to a beneficial
use rather than allowed to cumulate in storage.

5 (*Id.* p. 17, Ins. 4-6) Further:

6 Since the time of the Peace Agreement, the ability of the Non-Agricultural Pool
7 members to transfer amongst themselves has not proven sufficient to allow this
8 water to be put to maximum beneficial use pursuant to Article X, section 2 of the
Constitution. The Parties have thus deemed it necessary to relax further the
transferability provisions in order to accomplish this policy objective.

9 (Motion p. 17, Ins. 19-24)

10 The total quantity of the one time transfer, and the probable annual quantities are not
11 provided. There is no discussion of the 2001 amendments to Judgment Paragraph 8 and Exhibit
12 “G” to explain why they should be amended yet again.

13 2. 2001 Amendment to Judgment Paragraph 8

14 Judgment Paragraph 8 was amended in 2001, pursuant to Watermaster Motion, as
15 follows:

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

20 (4/19/2001 Order p. 2, Ins. 20-26)¹⁶

21 Watermaster’s 10/26/2000 Post-Order Memorandum explained that the amendment to

22 amendment (Exhibit “G” presumably) “. . . because it is contemplated that the transferred water may be distributed
23 to the Appropriative Pool members.” Both the “one time transfer” and “ongoing transfer to the Appropriative Pool”
24 require both Judgment amendments. Both transfers allow water to go to Appropriative Pool members. (The
referenced Peace Agreement Section 5.3(e) is limited to transfers to Watermaster for storage and recovery or
desalter replenishment only.)

25 ¹⁶ This is the language of the Court Order. Watermaster has misquoted this language in its proposed revised
26 Judgment Paragraph 8. Resolution 07-05 Attachment “H” should be corrected to reflect the 2001 Paragraph 8
amendment. In its 10/26/2000 Post-Order Memorandum, Watermaster explained that:

27 The reference to the Peace Agreement is necessary because it ensures that the life of the
28 amendment is coterminous with the Peace Agreement . . . if after thirty years, the Parties decide
not to renew the terms of the Peace Agreement, this amendment will also become ineffective.

(P. 5, Ins. 15-16, 20-21)

1 Judgment Paragraph 8 was to allow Non-Agricultural Pool members to voluntarily transfer or
2 lease their quantified production rights to other members of the Non-Agricultural Pool or to
3 Watermaster:

4 However, the amendment is limited in its scope as it only allows the Transfers by
5 the members of the Non-Agricultural Pool to Transfer water to each other or to
6 Watermaster. When the Transferee is Watermaster, the Transfer must be for the
7 purpose of either: (i) Desalter Replenishment or (ii) for a Storage and Recovery
8 program. (Proposed Amendment to Judgment Exhibit "G"; Peace Agreement
9 Section 5.3(e).)

10 (10/26/2000 Post-Order Memorandum p. 6, Ins. 7-11) This limitation in scope is stated to be
11 "most important" since:

12 Watermaster holds no residual power to acquire water rights from the Parties to
13 the Judgment or to dispose of them as its powers are prescribed by the Judgment.
14 (Judgment Paragraph 17.)

15 (*Id.* p. 6, Ins. 3-5)¹⁷

16 In its current Motion, Watermaster argues that Peace Agreement Section 5.3(e)
17 essentially gave the parties the right to transfer overlying non-agricultural water:

18 off the adjudicated overlying land to other members of the Pool or to Watermaster
19 for use as Desalter replenishment or for use in a storage and recovery program. . .
20 This interpretation recognized the limitations on transferability of Non-
21 Agricultural Pool water, but as a matter of policy also recognized that the
22 Judgment did not intend that this water simply accumulate in storage and never be
23 available for use.

24 (Motion p. 17, Ins. 14-19)¹⁸

25 ¹⁷ Watermaster has not addressed its previous caution that Watermaster's powers are prescribed by the Judgment
26 and do not include the power to acquire or dispose of water rights.

27 ¹⁸ The Peace Agreement alone could not give pool members the right to "transfer their water rights off the
28 adjudicated overlying land" without the 2001 amendment to Judgment Paragraph 8. The parties cannot now simply
"deem it necessary" to further relax the transfer of overlying Non-Agricultural Pool water without the further
amendment to Judgment Paragraph 8 and Exhibit "G". The Judgment did provide for the reallocation of overlying
(agricultural) water to the Appropriative Pool members. (Judgment Exhibit "H", ¶ 10) There is a somewhat
comparable provision for the Overlying (Non-Agricultural) Pool. The parties intended that the Overlying (Non-
Agricultural) rights would ultimately be exercised:

. . . by municipal systems within the Appropriative Pool. Inasmuch as the overlying right by
nature is appurtenant to the land and cannot be transferred, provision is made for an appropriator to
enter into and approve an agency agreement to produce water for delivery to the overlying land
pursuant to its overlying rights.

(Plaintiff's Post-Trial Memorandum p. 8, ¶ 6) Watermaster's Motion does not discuss this mechanism or indicate
why it has not been effective.

1 **3. Watermaster Offers No Evidence in Support of Its Motion to Amend**
2 **Judgment Paragraph 8**

3 The only reason Watermaster’s Motion gives for further amendment to Paragraph 8 is
4 that transfers among Non-Agricultural Pool members have “not proven sufficient to allow this
5 water to be put to maximum beneficial use . . .” There are no declarations in support of this
6 statement, and no further explanation, for example, of why Watermaster has not sought to
7 acquire water from that pool for desalter replenishment. None of the volumes of water involved
8 that would be affected by these amendments are described, with the sole exception of the special
9 transfer quantity earmarked for Santa Ana Water Company and Vulcan Materials.

10 **4. The Proposed Amendment to Judgment Paragraph 8 Effectively Removes**
11 **the Appurtenancy Requirement of the Judgment for Overlying Non-**
12 **Agricultural Pool Water**

13 At least for the period of the Peace Agreement (until 2030), the proposed amendment to
14 Judgment Paragraph 8 would allow transfers of water from the Overlying Non-Agricultural Pool
15 in accordance with the revised Pooling Plan as set forth in Exhibit “G” (discussed below).
16 Exhibit “G” adds two new options to the list of potential transfers of Overlying Non-Agricultural
17 Pool water:

18 (iii) [transfers] in conformance with the procedures described in Paragraph I of
19 the Purchase and Sale Agreement for the purchase of Water by Watermaster from
20 Overlying (Non-Agricultural) Pool dated June 30, 2007; or (iv) to Watermaster
21 and thence to members of the Appropriate Pool in accordance with the
22 following guidelines and those procedures Watermaster may further provide in
23 Watermaster’s Rules and Regulations . . .

24 (Resolution 07-05 Attachment “I”, ¶ 9)

25 Essentially no appurtenancy limitations on Overlying Non-Agricultural water would
26 remain once Judgment Paragraph 8 and Exhibit “G” are amended as the parties probably
27 intend.¹⁹ Members of that pool could continue to transfer either to each other or to Watermaster;

28 ¹⁹ The reference in Judgment Exhibit “G” (iii) to Paragraph I of the Purchase and Sale Agreement would authorize the one-time transfer designated as being “in furtherance of the Physical Solution and an aid of desalter replenishment” of 8,530 acre-feet (less a ten percent dedication to Watermaster for desalter production) to the San Antonio Water Company and Vulcan Materials. Provision (iv) is the much broader provision that should refer to the Purchase and Sale Agreement Paragraphs (a)-(h) to allow Watermaster to purchase and make available to the Appropriate Pool water from the Overlying Non-Agricultural Pool.

1 Watermaster could use the water for desalter replenishment or storage and recovery programs (if
2 allowed to do so by the Appropriative Pool),²⁰ or sell the water to Appropriative Pool
3 members.²¹ Watermaster does not address the issue of appurtenancy and what the consequences
4 would be of effectively removing that requirement. Appurtenancy is a fundamental aspect of
5 overlying groundwater rights.

6 **C. Proposed Amendment to Judgment Exhibit “G” (Overlying (Non-Agricultural) Pool**
7 **Pooling Plan)**

8 **1. Watermaster’s Motion**

9 Watermaster’s Motion asks the court to approve amendment to Judgment Exhibit “G” “as
10 presented”.²² (Motion p. 22, lns. 26-27) The proposed Judgment amendment is Attachment “I”
11 to Watermaster’s Resolution 07-05. As noted in IV.B, above, Watermaster wants to have
12 “additional transferability options” because of “the problem of continued underutilization of
13 Non-Agricultural Pool rights . . .” (*Id.* p. 10, lns. 5-7)

14 **2. 2001 Amendment to Judgment Exhibit “G”**

15 Judgment Exhibit “G” Paragraph 6 (“Assignment”) was also amended in 2001, pursuant
16 to Watermaster Motion, as follows:

17 . . . and (b) the members of the pool shall have the right to Transfer or lease their
18 quantified production rights within the pool or to Watermaster in conformance
19 with the procedures described in the Peace Agreement between the Parties
therein, dated June 29, 2000, for the term of the Peace Agreement.

20 (4/19/2001 Order p. 3, lns. 6-9)

21 _____
22 ²⁰ The Purchase and Sale Agreement gives the Appropriative Pool the final decision as to whether Watermaster
23 purchases from the Overlying (Non-Agricultural) Pool (Paragraph C) for desalter or storage and recovery use, or
whether Watermaster (after two years) must purchase and make available the water to the Appropriative Pool
(Paragraph H).

24 ²¹ Watermaster separately is seeking through proposed Peace II Section 4.4 to allow any party to the Judgment to
25 intervene in the Overlying (Non-Agricultural) Pool. (Motion p. 18, lns. 24-27; p. 19, lns. 1-10) Watermaster does
26 not seek to amend the Judgment to allow a member of the Appropriative Pool to intervene in the Overlying (Non-
Agricultural) Pool, although such intervention would appear to be inconsistent with Exhibit “G” Paragraph 6.
Intervention in the Overlying (Non-Agricultural) Pool has been allowed in the past (Court Order 4/19/2001, p. 3),
but not for members of another pool. *See* Judgment ¶60 (“Intervention After Judgment”).

27 ²² Watermaster does not provide a redline version of Exhibit “G”. The proposed changes include breaking the
28 current Paragraph 5 (Assessments) into 5(a) and 5(b), and adding a new 5(c) “Special Project OBMP Assessment”,
adding a new Paragraph 9 “Physical Solution Transfers” and subsections (a)-(h), and renumbering the current
Paragraph 9 as Paragraph 10.

1 **3. The Judgment Exhibit “G” Amendment Would Allow the Annual Purchase**
2 **and Transfer by Members of the Overlying (Non-Agricultural) Pool to**
3 **Watermaster and Thence to Appropriative Pool Parties**

4 The proposed Exhibit “G” Paragraph 9 would authorize members of the Overlying (Non-
5 Agricultural) Pool to transfer or lease “quantified Production rights and carry-over water held in
6 storage . . . in furtherance of the Physical Solution . . .”²³ The transfer or lease would be within
7 the pool (§ 9(i)), to Watermaster for storage and recovery or desalter replenishment (§ 9(ii)), for
8 one specific sale (§ 9(iii)), or “. . . to Watermaster and thence to members of the Appropriative
9 Pool in accordance with the following guidelines [Paragraph 9(a)-(h)] and those procedures
10 Watermaster may further provide in Watermaster’s Rules and Regulations . . .” Subsections (a)-
11 (h) describe the process by which Appropriative Pool members would have the opportunity each
12 year to purchase “pro-rata shares” of the water made available by the Overlying (Non-
13 Agricultural) Pool to Watermaster for purchase.²⁴

14 **4. The Judgment Exhibit “G” Amendment, as Drafted, Would Not Allow the**
15 **One-Time Purchase and Transfer to Watermaster and Thence to**
16 **Appropriate Pool Parties Contemplated in the Purchase and Sale Agreement**

17 Paragraph 8 allows transfer or lease in accordance with Exhibit “G”. Exhibit “G” allows:
18 “. . . the discretionary right to Transfer or lease their quantified Production rights and carry-over
19 water held in storage accounts . . .” Exhibit “G” Paragraphs 9(a)-(h) exclusively deal with
20 annual transfers. Exhibit “G” references the Purchase and Sale Agreement only with reference
21 to the agreement Paragraph I earmark transfer. It is the Purchase and Sale Agreement that
22 provides for that earmark transfer and for the one-time transfer of water held in storage by the
23 Overlying (Non-Agricultural) Pool as of June 30, 2007. Exhibit “G” explicitly references only
24 the earmark transfer and does not explicitly authorize the main one-time transfer that is the
25 principal subject to the Purchase and Sale Agreement. Exhibit “G” Paragraph 9(iv) probably
26 should reference the Purchase and Sale Agreement, rather than just the Paragraph 9(a)-(h)

27 _____
28 ²³ The price of water is set at “92% of the then-prevailing ‘MWD Replenishment Rate’”. “MWD Replenishment
Rate” does not appear to be defined. It is not defined in the Peace Agreement, Peace II Agreement, or Watermaster
Rules and Regulations.

²⁴ As discussed in Subsection 4, below, Paragraph 9(iv) probably was intended to refer to the Purchase and Sale
Agreement rather than to Watermaster Rules and Regulations, since only the Purchase and Sale Agreement would
authorize the one-time transfer to Watermaster for the benefit of Appropriative Pool members.

1 “guidelines” and Watermaster Rules and Regulations.

2 **5. The Judgment Exhibit “G” Amendment Would Allow the One-Time**
3 **Purchase and Transfer by Watermaster to One Appropriative Pool Party**
4 **and One Overlying (Non-Agricultural) Pool Party**

5 Watermaster’s Motion is silent on this aspect of the proposed amendment. Exhibit “G”
6 Paragraph 9(iii) would allow Watermaster to “transfer” water as provided in Paragraph I of the
7 Purchase and Sale Agreement. Paragraph I of that agreement provides that Watermaster will
8 purchase 8,530 acre-feet of water “less a ten percent dedication to Watermaster for Desalter
9 Production” and immediately make that quantity of water available to the San Antonio Water
10 Company (a member of the Appropriative Pool) and Vulcan Materials (a member of the
11 Overlying (Non-Agricultural) Pool “. . . under terms established as between those parties.”²⁵

12 **6. The Proposed Amendment to Exhibit “G” Paragraph 5(c) Would Impose a**
13 **Ten Percent Tithe on the Overlying (Non-Agricultural) Pool**

14 Exhibit “G” Paragraphs 9(a)-(h) set forth the process by which members of the Overlying
15 (Non-Agricultural) Pool can sell water each year that is allocated to them under the Judgment.²⁶
16 Exhibit “G” Paragraph 5 would also be amended as follows:

17 (c) Special Project OBMP Assessment. Each year, every member of this Pool
18 will dedicate ten (1) percent of their annual share of Operating Safe Yield to
19 Watermaster or in lieu thereof Watermaster will levy a Special Project OBMP
20 Assessment in an amount equal to ten percent of the Pool member’s respective
21 share of Safe Yield times the then-prevailing MWD Replenishment Rate.²⁷

22 Pool members can choose to sell water each year or not.²⁸ However, Paragraph 5(c)
23 requires that pool members pay – in water or money – ten percent of their annual share of Safe
24 Yield as a “Special Project OBMP Assessment” whether water is transferred or not. There is no
25 discussion in Watermaster’s Motion of this assessment. The assessments are not directed to be
26 used for desalter replenishment (as is the case for the ten percent deducted in the Purchase and
27

28 ²⁵ Paragraph I does not identify the source of the water, although proposed Exhibit “G” Paragraph 9(iii) suggests that the source is Overlying (Non-Agricultural) Pool water.

²⁶ It is apparently intended that all pool water accumulated through June 30, 2007, would be sold pursuant to the Purchase and Sale Agreement, which would leave only annual water for future sales under Paragraphs 9(a)-(h).

²⁷ The reference to “Operating Safe Yield” is in error. This pool has shares only in Safe Yield. (Judgment Exh. “G” ¶ 1)

²⁸ Watermaster must first find that pool members are using recycled water to the extent possible. (¶ 9(g))

1 Sale Agreement for the one-time transfer).

2 The ten percent tithe applied to annual water goes directly to certain members of the
3 Appropriative Pool.²⁹ Peace II Paragraph 9.2(a) allocates the “Non-Agricultural Pool Special
4 Assessment” in differing quantities to seven named Appropriative Pool members for ten years.
5 After ten years, Peace II Paragraph 9.2(b) distributes the “water (or financial equivalent)” pro
6 rata to Appropriative Pool members that is “. . . in excess of identified Desalter replenishment
7 obligations. . .” (citing Paragraph 6.2), even though the annual transfer water ten percent
8 governed by Exhibit “G” Paragraph 5(c) makes no reference to use for desalter replenishment.³⁰

9 **7. The Proposed Judgment Exhibit “G” Paragraph 5(c) Amendment May Be**
10 **Prohibited by Judgment Paragraph 15(b)**

11 The proposed Paragraph 5(c) “Special Project OBMP Assessment” of ten percent of the
12 pool’s annual share of Operating Safe Yield to the Appropriative Pool could be construed as a
13 reallocation of Safe Yield from the Overlying (Non-Agricultural) Pool to the Appropriative Pool.
14 The court’s continuing jurisdiction does not allow the court to approve a reallocation of Safe
15 Yield. (Judgment ¶ 15(b))

16 **8. The Proposed Judgment Exhibit “G” Paragraph 9 Amendment Raises**
17 **Questions as to Watermaster’s Power to Acquire Water Rights from Parties**

18 The proposed Paragraph 9 refers to “Transfer or lease [of] their quantified Production
19 rights and carry-over water held in storage accounts.” As Watermaster stated in its 2000 Post-
20 Order Memorandum:

21 Watermaster holds no residual power to acquire water rights from the Parties to
22 the Judgment or to dispose of them as its powers are prescribed by the Judgment.
(Judgment Paragraph 17.)

23 (10/26/2000 Post-Order Memorandum p. 6, lns. 3-5) The balance of Paragraph 9 and (a)-(h)
24 refer to “pro rata share[s] of the Safe Yield”, which may be equivalent to “rights”.

25 _____
26 ²⁹ It is not clear where the special monetary assessment goes for the first ten years.

27 ³⁰ Only the Purchase and Sale Agreement requires a ten percent “Dedication to Desalter Replenishment”.
28 (Paragraph E) Overlying (Non-Agricultural) Pool members agree to dedicate ten percent of the “Storage Quantity”
(as of June 30, 2007) “. . . for replenishment of Desalter production without compensation.” This dedication would
occur whether or not the Appropriative Pool allows Watermaster to acquire any additional portion of the “Storage
Quantity” for desalter replenishment.

1 **D. Watermaster Should Submit a Memorandum of Points and Authorities in Support**
2 **of Its Motion to Amend the Judgment**

3 The court, under its continuing jurisdiction, may be called upon to interpret, supervise,
4 and enforce the terms of the Judgment. It is necessary that the meaning of the proposed
5 Judgment amendments is clear. The need to clarify the meaning of proposed amendments was
6 raised in the context of the 2001 amendments to Judgment Paragraph 8 and Exhibit "G". The
7 court issued an order on September 28, 2000, granting Watermaster's motion to amend
8 Paragraph 8 and Exhibit "G" subject to the parties' filing post-hearing briefs "clarifying their
9 intent". (9/28/2000 Order p. 3) Watermaster filed its Post-Order Memorandum:

10 to create a historical record concerning the rationale and justification for the
11 changes to assist in future interpretation and construction of the Judgment and the
OBMP.

12 (Watermaster's Post-Order Memorandum (10/26/2000) p. 2, lns. 16-18) In this case,
13 Watermaster should provide the court with a detailed memorandum of points and authorities
14 which addresses in full all questions regarding the three proposed Judgment amendments.

15 **V. WATERMASTER RESOLUTION AND DOCUMENTS PROPOSED**
16 **FOR COURT APPROVAL**

17 **A. Watermaster Resolution No. 07-05**

18 **1. There Is No Evidence of Watermaster's Adoption of the Resolution or**
19 **Commitment to Peace II Measures**

20 Since Watermaster is not a party to the Peace II Agreement, Watermaster's commitment
21 to the Peace II measures is said to be found in its adoption of Watermaster Resolution No. 07-05.
22 Watermaster requests the Court to approve its adoption of the resolution and direct Watermaster
23 to proceed in accordance with its terms and the documents attached to the resolution. (Motion,
24 p. 23, lns. 4-5)

25 Preliminarily, it should be noted that Watermaster offers no evidence to "prove up" its
26 adoption of Resolution No. 07-05.³¹ Further, the only commitment or "resolution" on the part of
27 Watermaster is to transmit the Peace II documents to the Court for approval. (Resolution, ¶ 16)

28 ³¹ Statements made in moving papers are not evidence.

1 By way of contrast, Watermaster made several commitments in conjunction with the
2 original Peace Agreement. The Board “unanimously adopted the goals and plans of the Phase I
3 Report consistent with the Implementation Plan and Peace Agreement.” The Board resolved that
4 it would “proceed in accordance with the OBMP Implementation Plan and the Peace
5 Agreement.” The Board further resolved that it would “comply with the conditions described in
6 Article V of the Peace Agreement.” Finally, the Board resolved that it would “adopt all
7 necessary policies and procedures in order to implement the provisions set forth in Article V [of
8 the Peace Agreement]. (Order Concerning Adoption of OBMP, dated July 13, 2000, p. 3, Ins. 8-
9 17)

10 2. Terms of Resolution

11 Resolution 07-05 resolves and determines the following:³²

- 12 • Watermaster caused the completion of a preliminary engineering, hydrogeologic, and
13 technical evaluation of the physical impact to the Basin and to the Parties to the Judgment
14 that may result from implementation of the Peace II measures.” (Resolution, p. 2, ¶ 1.)
- 15 • Joe Scalmanini of Luhdorff and Scalmanini Consulting Engineers transmitted his
16 technical review [of the preliminary evaluation]. (*Id.* at ¶ 2.)
- 17 • Watermaster caused the preparation of a specific project description ...for the purpose of
18 conducting a more refined engineering, hydrogeologic and technical evaluation of the
19 physical impacts to the Basin and to the Parties...”(*Id.* at ¶ 3.)
- 20 • Watermaster caused the completion of a macro socioeconomic analysis... (*Id.* at ¶ 4.)
- 21 • Watermaster caused an update of a previously completed socioeconomic analysis. (*Id.* at
22 ¶ 5.)
- 23 • Watermaster has caused the preparation of a supplement to the OBMP. (*Id.* at ¶ 9.)
- 24 • Watermaster has prepared a schedule summarizing the total quantity of groundwater that
25 will be produced through the proposed Basin Re-Operation to obtain Hydraulic Control
26 and which characterizes and accounts for all water that is projected to be produced by the
27 Desalters for the initial Term of the Peace Agreement...[Attachment “E”.] (*Id.* at ¶ 10.)
- 28 • Western Municipal Water District’s proposal for development and construction of
“Future Desalters” is the only one received in response to Watermaster’s request for
proposals. (*Id.* at ¶ 11.)
- The Peace II measures consist of: Watermaster’s election to amend Watermaster Rules

32 Watermaster filed an unauthenticated copy of the resolution. The resolution is comprised of Paragraphs 1-5 and Paragraphs 9-16. There are no paragraphs numbered 6-8.

1 and Regulations; Watermaster's execution and Court approval of Purchase and Sale
2 Agreement with the Non-Agricultural Pool; Watermaster's and the Court's approval of
3 the proposed amendments to the Judgment; Watermaster's approval of and agreement,
4 upon further order of the Court, to act in accordance with the Peace II Agreement;
5 Watermaster's and the Court's approval of the 2007 Supplement to the OBMP
6 Implementation Plan; Execution of the Second Amendment to the Peace Agreement, its
7 approval by Watermaster and an order from the Court directing Watermaster to proceed
8 in accordance with its terms. (*Id.* at ¶ 12.)³³

- 9 • The Overlying (Non-Agricultural) and Overlying (Agricultural) Pools have approved the
10 Peace II measures. (*Id.* at ¶ 13.)³⁴
- 11 • The Advisory Committee has approved the Peace II measures. (*Id.* at p. 14.)³⁵
- 12 • Watermaster is not committing to carry out any project within the meaning of CEQA
13 unless and until CEQA compliance has been demonstrated. (*Id.* at ¶ 15.)
- 14 • The Watermaster Board will transmit the resolution and Peace II documents to the Court
15 requesting the Court "to approve the proposed Judgment Amendments and to further
16 order that Watermaster proceed to further implement the 2007 Supplement to the OBMP
17 as provided in the Peace II Measures." (*Id.* at ¶ 16.)

18 **3. Does Watermaster have Standing under Paragraph 31 to Request Approval
19 of the Resolution?**

20 Watermaster requests approval of Resolution No. 07-05 under paragraph 31 of the
21 Judgment. Paragraph 31 "provides for review by the Court of all Watermaster actions, decision,
22 or rules" (Report and Recommendation of Special Referee, dated December 12, 1997, Part III, p.
23 10, Ins. 21-22)³⁶ Such review may be made by "the court on its own motion or on timely motion
24 by any party, *the Watermaster (in the case of a mandated action)*, the Advisory Committee, or
25 any pool committee..." (Judgment, ¶ 31 [italics added]) Thus, when an Advisory Committee
26 recommendation is mandatory "(i.e., is approved by 80 or more of 100 votes)" (Report and
27

28 ³³ The resolution does not indicate that Court approval will be sought for amendments to Watermaster Rules and
Regulations; this is inconsistent with Watermaster's motion, which does request Court approval for rule
amendments. There is no evidence (declaration) to establish that: Watermaster has executed the Purchase and Sale
Agreement; Watermaster has approved the proposed Judgment amendments; Watermaster has approved the Peace II
Agreement and agreed to act accordingly; Watermaster has approved the 2007 Supplement to the OBMP
Implementation Plan; the Second Amendment to the Peace Agreement has been executed by the parties and
approved by Watermaster.

³⁴ There is no declaration to support the assertions concerning pool committee approval of Peace II measures.

³⁵ There is no declaration to support the assertion of Advisory Committee approval of Peace II measures. Moreover,
Watermaster has not told the Court whether or not the approval by the Advisory Committee is a "mandated" action
and the voting specifics, (i.e., votes cast in favor of or against the Peace II measures).

³⁶ Part III of this report by the Special Referee was "adopted and approved by the court and incorporated" into its
Ruling, dated Feb. 19, 1998. (Ruling, p. 11, Ins. 21-23 and p. 12, ln. 1.)

1 Recommendation of Special Referee, *supra*, Part III, p. 20, Ins. 6-7), Watermaster “may apply to
2 the Court for review.” (*Id.* at p. 20, Ins. 10-11, citing Judgment ¶ 31(b).”

3 Watermaster presents no evidence establishing its request for Court approval is based on
4 a mandated action by the Advisory Committee. There is, thus, a question as to Watermaster’s
5 standing to bring this motion under Paragraph 31 of the Judgment. This may be remedied by the
6 submission of a declaration providing the voting specifics of the Advisory Committee’s approval
7 of the Peace II measures.

8 **4. De Novo Review under Paragraph 31**

9 Assuming Watermaster has standing to bring the motion, the question becomes what type
10 of review is to be conducted. Paragraph 31 requires the Court to conduct a “de novo” review:

11 De Novo Nature of the Proceedings. ...[T]he Court shall require the moving
12 party to notify the active parties, the Watermaster, the Advisory Committee and
13 each Pool Committee, of a date for taking evidence and argument, and on the date
14 so designated shall review de novo the question at issue. Watermaster’s findings
or decision, if any, may be received in evidence at said hearing, but shall not
constitute presumptive or prima facie proof of any fact in issue. (Judgment, ¶
31(d).)

15 The Court’s role, therefore, is to receive and weigh evidence presented in support of and
16 against the action or decision being presented for review. This Judgment provision assumes that
17 Watermaster will have made some findings or a decision on the facts in issue. In this instance,
18 however, there is no evidence that Watermaster made any findings or reached any decision
19 regarding any factual issues related to the Peace II measures. Indeed, the only decision reflected
20 in Resolution No. 07-05 is Watermaster’s decision to transmit the Peace II documents to the
21 Court, requesting Court approval of the proposed Judgment amendments and an order to
22 Watermaster to implement the provisions of the 2007 Supplement to the OBMP Implementation
23 Plan. (Resolution, ¶ 16)

24 **5. The Court has Broad Continuing Jurisdiction to Ensure Beneficial Use**

25 With limited exceptions not applicable here, under Paragraph 15 of the Judgment, the
26 Court retains and reserves “full jurisdiction, power and authority...as to all matters contained” in
27 the Judgment “to make such further or supplemental orders or directions as may be necessary or
28 appropriate for interpretation, enforcement or carrying out” the Judgment. In this instance the

1 Court has broad jurisdiction to review Watermaster actions and decisions. That jurisdiction
2 extends to an inquiry as to whether proposed changes are reasonable and beneficial:

3 Reservation of jurisdiction by the trial court is one method of addressing changing
4 conditions to ensure that the water supply supports the maximum number of
5 beneficial uses. . . By maintaining jurisdiction, the trial court can determine, on a
6 case-by case basis, whether new or changed uses are in fact reasonable and
7 beneficial.

8 (1 Slater, California Water Law and Policy (Nov. 2007), § 9.10[3], p. 9-76)

9 **6. Watermaster Inappropriately Urges a Limited Review by the Court**

10 Watermaster contends the Judgment does not provide “a detailed explanation” of the
11 standard of review. Watermaster urges the Court to adopt the standard stated in Paragraph 15 (d)
12 of the Judgment, which applies specifically to proposed modifications of the assessment formula
13 for the Appropriative Pool, and in Paragraph 16, which applies specifically to a motion to change
14 the Watermaster. Watermaster proposes to limit the Court’s review to a determination of
15 whether there is a compelling reason to disapprove the Watermaster action or decision.

16 Watermaster argues that this standard is consistent with the nature of a stipulated judgment.

17 (Motion, p. 10, lns. 11-23)

18 Giving deference to the parties by constricting the Court’s review to the question of
19 whether there is a compelling reason to disapprove the action makes sense in the limited
20 circumstance of modifications to the assessment formula for the Appropriative Pool and a
21 change of Watermaster. However, there is nothing in the nature of a stipulated judgment, per se,
22 that would require a limited review by the Court in other circumstances. Indeed, with respect to
23 stipulated judgments in general, the Court is charged with exercising its discretion to ensure a
24 “just” judgment is entered:

25 While is it entirely proper for the court to accept stipulations of counsel that
26 appear to have been made advisedly, and after due consideration of the facts, the
27 court cannot surrender its duty to see that the judgment to be entered is a just one,
28 nor is the court to act as a mere puppet in the matter. (*California State Auto. Ass.
Inter-Ins. Bureau v. Superior Court* (1990) 50 Cal.3d 658, 664, quoting *City of
Los Angeles v. Harper* (1935) 8 Cal.App.2d 553, 555.)

[Under Code of Civil Procedure section 664.6] a stipulated judgment is indeed a
judgment; entry thereof is a judicial act that a court has discretion to perform. . . .
[A court] may reject a stipulation that is contrary to public policy [citation], or
one that incorporates an erroneous rule of law [Citation]. (*Ibid.*, quoting Code of

1 Civ. Proc., § 664.6.)

2 In this instance the Court is charged with assuring the protection of the private rights of
3 the parties and the general public interest in the preservation of the resources of Chino Basin. In
4 the creation and organization of a Watermaster, Advisory Committee and pool committees under
5 the Judgment,

6 . . . [t]he public interests in the preservation of the water resource [Chino Basin]
7 was protected and assured in the sense that the Court's Watermaster is an
8 overlying district, which holds no rights to produce ground water but is the
9 importing agency bringing supplemental water into the basin. . . [T]here is a
balance created to assure the protection of the private rights of the parties and the
general public interest in the preservation of the resource.

10 (Plaintiff's Post-Trial Memorandum, dated July 11, 1978, p. 4, ¶ 2)

11 Finally, Watermaster concedes that, in reviewing the original Peace Agreement several
12 years ago, the Court analyzed whether the measures were consistent with and promoted the
13 Physical Solution under the Judgment. (Motion, p. 10, ln.26 and p. 11, lns. 1-2) That review
14 was not undertaken under a constricted "compelling reason" standard of review and Watermaster
15 did not argue that it should have been.

16 **7. What is the Court's Obligation under Paragraph 31?**

17 In reviewing a motion brought by Watermaster under Paragraph 31 of the Judgment, the
18 Court must: (1) weigh the evidence offered in support of the mandated action or decision; (2)
19 analyze whether the mandated action or decision is consistent with and promotes the Physical
20 Solution under the Judgment; (3) analyze whether the mandated action or decision is consistent
21 with the protection of the rights of the parties and the general public interest in preservation of
22 the water resources of Chino Basin; and (4) analyze whether the mandated action or decision is
23 contrary to the public policy requiring reasonable and beneficial use of water. (California
24 Constitution, Art .X, Sec. 2) Specific inquiries suggested for the Court are discussed in Section
25 VI, below.

26 **B. Project Description (Resolution No. 07-05, Attachment A)**

27 **1. This Document is a Non-Review Item**

28 The "Project Description" document is included in Watermaster's motion as Exhibit A,

1 Attachment A. The document “describes the actions to be taken pursuant to the Basin Re-
2 operation strategy in order to form the basis for the model review and CEQA analysis....”
3 Watermaster labels this document a “non-review item” submitted to assist the Court in its
4 review. (Motion, p. 9, lns. 20-26)

5 **2. Watermaster Anticipates CEQA Review for Desalter Expansion Only**

6 According to the document, it was prepared for use in, inter alia, “an environmental
7 impact report to be prepared as part of the expansion of the desalters.” (Project Description, ¶ 1)
8 This suggests that the only CEQA review Watermaster anticipates is for expansion of the
9 desalters. Watermaster does not address the scope of CEQA review.³⁷ CEQA review apparently
10 will not cover recharge and storage and recovery expansion, which may explain why
11 Watermaster failed to submit the Project Description document to the Court earlier this year, as
12 requested: “The court is requesting the complete physical project description, integrating the
13 desalter, recharge and replenishment, and storage and recovery descriptions, to be submitted no
14 later than August 1, 2007...” (Order Concerning OBMP Status Report 2006-02, Future
15 Desalting Plans, and MZ-1 Long-Term Plan, dated May 23, 2007.)

16 **3. Other Documents Containing Project Descriptions**

17 It should be noted that the Peace II Agreement contains a provision labeled “Project
18 Description”. (Peace Agreement, p. 6, ¶ 5.4) The Peace II Agreement project description is not
19 the same as the project description in this document. The project description in the Peace
20 Agreement only encompasses the addition of “up to 9 mgd to existing Desalters. ...[which] will
21 include production capacity from new groundwater wells that will be located in the Southerly
22 end of the Basin...” (*Ibid.*) The project description in the Project Description document
23 encompasses not only expansion of the desalter program, but also “the strategic reduction in
24 groundwater storage (re-operation) that, along with the expanded desalter program, significantly
25 achieves hydraulic control.” (Project Description document, p. 4)

26 There is yet a third “Project Description,” which is found in the Final Technical Report at

27 ³⁷ The Peace II Agreement addresses CEQA compliance briefly, and acknowledges that IEUA will be Lead Agency
28 for CEQA review. (Peace II Agreement Article II) See discussion, below, at Section VI.H.

1 section 7.1. This description is nearly identical to that contained in the Project Description
2 document. There is, however, one element that is missing from the project description in the
3 Final Technical Report; that is, the mention of a need to expand artificial recharge capacity in the
4 basin to meet future replenishment obligations. This is perhaps explained by the fact that the
5 Project Description document indicates that expansion of artificial recharge capacity will occur
6 independently from the proposed project.

7 **C. Sunding Macro Analysis (Resolution No. 07-05, Attachment B)**

8 The “macro analysis” by Professor David Sunding, dated November 29, 2006, is titled
9 Analysis of Aggregate Costs and Benefits of Hydraulic Control, Basin Re-Operation and
10 Desalter Elements of Non-Binding Term Sheet (“Sunding Macro Analysis”). It is attached to
11 Watermaster’s motion as Attachment B to Exhibit A to the motion. The analysis “measures the
12 economic costs and benefits of achieving hydraulic control....” The report concludes that,
13 “depending on the scenario chosen, the net benefits...range between \$283.1 million and \$438.8
14 million in 2006 dollars.” (Sunding Macro Analysis p. 1) The gains are said to result from “the
15 ability to use recycled water for a fraction of recharge [cost] if hydraulic control is achieved, the
16 value of new yield, and the value of the forgiven desalter replenishment.” (*Id.*, at p. 6)

17 Dr. Sunding made several assumptions about groundwater production for his study.
18 These assumptions are displayed in Table 2. The table shows groundwater production increasing
19 from 223,505 to 270,014 acre-feet for the study period. Operating safe yield is 145,000 acre-feet
20 through 2017, and 140,000 thereafter. New storm-water recharge is assumed to be 12,000 acre-
21 feet annually. (*Id.* p. 2) Dr. Sunding also assumed that with hydraulic control, a total of 12,500
22 acre-feet per year of new yield would result from Santa Ana River inflows. (*Id.*, at p. 4)³⁸

23 Dr. Sunding states that *without* hydraulic control, replenishment would have to be met by
24 the purchase of water from MWD; whereas, *with* hydraulic control, recycled water can be used
25 for 30% of the basin replenishment obligation. (*Id.* p. 3) In a footnote, Dr. Sunding
26 acknowledges that, even *without* hydraulic control, recycled water could be used for

27 _____
28 ³⁸ The Draft and Final Technical Reports do not support these assumptions. The value of Dr. Sunding’s macro
analysis perhaps should be reconsidered in view of the Draft and Final Technical Reports.

1 replenishment, if it is first treated. Dr. Sunding states that costs are not available for this option,
2 however, at this time. (*Ibid.*, fn. 2)

3 With regard to replenishment forgiveness, Dr. Sunding points out that the “option value”
4 of the water was not calculated. The “option value” pertains to the ascribed value of the “water
5 that is not available in the event of a major disruption in surface water supplies to the region.”
6 (*Id.* p. 6, fn. 7) Dr. Sunding reports that Watermaster staff was not concerned about the
7 dewatering “since the percentage depletion of the aquifer envisioned through re-operation is
8 relatively small.” (*Id.*) Watermaster should provide a technical assessment that quantifies water
9 in basin storage over time (which was done for 1933 to 1997 in the OBMP process), describes
10 Basin water levels, and projects future storage and water levels. A sense of history and
11 perspective is required to support Dr. Sunding’s reliance on Watermaster staff, and this
12 information should be provided to the court.³⁹

13 **D. Sunding Micro Analysis (Resolution No. 07-05, Attachment C)**

14 The title of the Professor Sunding’s “micro analysis,” dated October 17, 2007, is Report
15 on the Distribution of Benefits to Basin Agencies from the Major Program Elements
16 Encompassed by the Peace Agreement and Non-Binding Term Sheet (“Sunding Micro
17 Analysis”). The report was filed with Watermaster’s motion, as Attachment C to Exhibit A. The
18 analysis “measures the costs and benefits to various Chino Basin agencies of the program
19 elements encompassed by” the original Peace Agreement and the Peace II measures. (Sunding
20 Micro Analysis p. 1) The report examines net returns to the ten largest groundwater-producing
21 agencies, which account for 91% of Operating Safe Yield. (*Ibid.*)

22 Dr. Sunding’s report shows that the original Peace Agreement and the Peace II measures
23 produce net benefits over \$904 million in present value terms. Eighty percent of the net benefits
24 result from the Peace II measures. (*Ibid.*) Two of the agencies – the City of Ontario and
25 Cucamonga Valley Water District –account for approximately half of the demand for basin water
26 over the 2007-2030 period of study. These two agencies stand to receive over half of the net

27
28 ³⁹ The court has previously asked for this information. (5/24/2007 Order)

1 benefits resulting from the agreements. (*Id.*, at p. 2)

2 Not surprisingly, nine of the ten agencies that receive benefits have filed papers in
3 support of Watermaster’s motion for approval of the Peace II measures: Fontana Union Water
4 Company, San Antonio Water Company, and Monte Vista Water District filed Joinders to
5 Watermaster’s motion, on November 9, 2007. The City of Pomona filed a Statement in Support
6 of the motion, also on November 9, 2007. On November 14, 2007, the City of Chino Hills, the
7 City of Upland, and Cucamonga Valley Water District filed Joinders to Watermaster’s motion.
8 On November 15, 2007, the City of Ontario filed a Joinder to the motion and Declaration of
9 Kenneth Jeske. On November 26, 2007, the City of Chino filed a Joinder and Statement in
10 Support of Watermaster Motion to Approve Peace II Documents. The member agencies for
11 Metropolitan (IEUA, Western Municipal Water District, and Three Valleys Municipal Water
12 District) also filed papers in support of Watermaster’s motion.

13 Two of Dr. Sunding’s findings may explain why an increase in basin recharge capacity
14 was not considered in conjunction with the Peace II measures. One finding is that “policies that
15 increase Basin recharge capacity alter the distribution of net benefits.” The other is that “policies
16 which lead [to] an increase in Basin safe yield are not only more valuable to agencies in the
17 Basin than an increase in recharge capacity, but the benefits are also distributed more equally.”
18 (*Id.* pp. 4-5)

19 Dr. Sunding explains that the main factor associated with the increased net benefit
20 resulting from the Peace II measures is “the displacement of Tier 2 water with recycled water,
21 SAR in-flow, and in the period 2007-2024, with forgiveness for 400,000 AF of Basin over-draft
22 to attain hydraulic control.” (*Id.* p. 29) Under Peace II measures “Tier 2 water purchases in the
23 year 2015 are 10,186 AF, which represents a substantial reduction from the 137,089 AF of Tier 2
24 water purchases that take place under baseline conditions ... and the 82,658 AF under Peace I
25 conditions.” (*Id.* at p. 30) Major economic benefit will derive from the Peace II measures.

26 **E. Supplement to OBMP Implementation Plan (Resolution No. 07-05, Attachment D)**

27 **1. Watermaster Requests Court Approval under Paragraph 31**

28 Watermaster requests Court review and approval of this document under Paragraph 31 of

1 the Judgment. The title of the document is 2007 Supplement to the Implementation Plan
2 Optimum Basin Management Program for the Chino Basin. It is dated October 25, 2007, and
3 was filed with Watermaster's motion as Attachment D to Exhibit A. This document "describes
4 the activities that will be under taken pursuant to the Basin Re-operation strategy" as authorized
5 by the proposed Judgment amendments. (Motion p. 9, Ins. 8-12)

6 **2. The 2007 Supplement Simply Updates the Implementation Status for Most of**
7 **the OBMP Program Elements**

8 The 2007 Supplement is said to be a "supplement to" the OBMP Implementation Plan "as
9 determined through the 2007 Peace II process." (2007 Supplement, p. 1) Like the original
10 OBMP Implementation Plan, the 2007 Supplement is organized into nine OBMP Program
11 Elements. The provisions under Program Element 1 (Comprehensive Monitoring Program),
12 Program Elements 3 & 5 (Water Supply Plan for Impaired Areas and Regional Supplemental
13 Water Program),⁴⁰ Program Element 4 (Comprehensive Groundwater Management Plan for MZ-
14 1), Program Elements 6 & 7 (Cooperative Programs with Regional Board and other agencies and
15 Salt Management Program), and Program Elements 8 & 9 (Groundwater Storage Management
16 Program and Storage and Recovery Programs) are basically "updates" to the "Implementation
17 Status" sections of the Program Elements in the original OBMP Implementation Plan. Indeed,
18 the discussion of these seven program elements should be included, instead, in Watermaster's
19 semiannual OBMP Implementation Status Reports.⁴¹

20 **3. OBMP Implementation Plan Program Element 2 is Modified by the Peace II**
21 **Agreement**

22 OBMP Program Element 2 is the Comprehensive Recharge Component. The original
23 OBMP Implementation Plan was based on the understanding that "[t]he volume of recycled
24 water that can be used in the Basin without TDS mitigation, is numerically tied to the average
25 annual quantity of storm flow that recharges the Basin." It was anticipated that the two new
26

27 ⁴⁰ The Peace II Agreement Section 5.2 requires inclusion of certain provisions in the 2007 Supplement. It does not
appear that the supplement fully reflects Section 5.2.

28 ⁴¹ Watermaster's OBMP Status Report 2007-01, due September 4, 2007, has not yet been filed with the court.

1 desalters described in the Implementation Plan, and the increase in storm water recharge, would
2 provide the mitigation for expanded use of recycled water. (OBMP Implementation Plan, p. 13
3 & 25)

4 The provisions in the 2007 Supplement pertaining to Program Element 2 (2007
5 Supplement, p. 3-8) appear to state a plan for implementation of the parties' agreement with
6 regard to recharge under the Peace II Agreement. The Peace II Agreement is based on the
7 proposal for re-operation of the basin for hydraulic control. The concept of re-operation for
8 hydraulic control was not included in the original Peace Agreement, and, ergo, was not included
9 in the original OBMP Implementation Plan. The 2007 Supplement thus introduces a new
10 concept to the OBMP Implementation Plan; this may be construed as a modification to the
11 OBMP Implementation Plan.

12 Watermaster did not supply a red-line version of Program Element 2 of the OBMP
13 Implementation Plan with proposed new provisions.. More importantly, however, the 2007
14 Supplement does not follow the provisions related to recharge contained in the Peace II
15 Agreement. (See Peace II Agreement, Art. VIII.) The Court should not approve this document
16 until the proposed modifications have been explained fully to the Court, and the Court is
17 satisfied that the 2007 Supplement accurately reflects the agreement of the parties. The standard
18 of review under Paragraph 31 of the Judgment is discussed in Section V. A. 7. above.

19 **F. Tables [7-6(a) and (b)] (Resolution No. 07-05, Attachment E)**

20 **1. Watermaster's Motion**

21 Although not labeled as such, these tables are duplicates of Tables 7-6(a) and 7-6(b) in
22 the Technical Report. The attachment contains no explanation of the tables, and no reference to
23 the Technical Report. There is no reference to Attachment E in Watermaster's Motion. The
24 Motion, however, requests that the court approve Watermaster's Resolution 07-05 and direct
25 Watermaster ". . . to proceed in accordance with the terms of the Resolution and documents
26 attached thereto . . .", which include the Attachment E tables.

27 ////

28 ////

1 Resolution 07-05 does discuss the Attachment E tables, which it refers to as a
2 “schedule”.⁴² The Resolution explains that the schedule includes a summary of the “. . .
3 cumulative total of groundwater production and desalting from all authorized Desalters and other
4 activities authorized by the 2007 Supplement to the OBMP Implementation Plan as amended as
5 provided in the Peace Agreement. . .” The schedule:

6 . . . (i) identifies the total quantity of groundwater that will be produced through
7 the proposed Basin Re-Operation to obtain Hydraulic Control, and (ii)
8 characterizes and accounts for all water that is projected to be produced by the
9 Desalters for the initial Term of the Peace Agreement (by 2030) as dedicated
water, New Yield, controlled overdraft pursuant to the Physical Solution or
subject to Replenishment.

10 (Resolution 07-05 p. 3, ¶ 10) The Resolution also indicates that Watermaster will: “. . . modify
11 its projections from time to time, as may be prudent under the circumstances.” There is no
12 further discussion in Resolution 07-05 of the Attachment E tables.

13 2. The Tables Overstate New Yield

14 As discussed, above, in Section IV.A.4, the third column (New Yield) substantially
15 overstates the quantity of “new yield” that will be obtained through basin reoperation. If desalter
16 pumping is maintained at approximately 40,000 acre-feet (by 2013/14), and a full 400,000 acre-
17 feet of “controlled overdraft” is allowed as “replenishment allocation” for the CDA and
18 “Desalter III”, then the “residual replenishment obligation” would be substantially increased over
19 that shown on the tables.⁴³ The statement in Resolution 07-05 that Watermaster will modify its
20 projected schedule “from time to time, as may be prudent under the circumstances” does not
21 adequately address the problems with the initial schedule.

22 ////

24 ⁴² Peace II Section 7.2(e)(i) states that an “initial schedule” was to be submitted to the court along with the
25 Resolution. Attachment “E” is, therefore, apparently the Watermaster’s “initial schedule”. Watermaster does not
indicate which of the two schedules it has chosen.

26 ⁴³ The New Yield and stormwater assumptions from 2000/01 through 2006/07 are shown on Table 7-3 of the
27 Technical Report. It appears from the tables and Figure 7-7 that New Yield has been overstated by a total of 37,043
28 acre-feet for that period, and stormwater by 24,000 acre-feet. The Exhibit “E” tables should include assessments for
these overestimates. Table 7-3 footnote 4 implies that only future values will be “trued up” with the model;
Watermaster accounting should be corrected back to 2000/01. This overstatement of New Yield should not be
considered an “error” for purposes of proposed new Section 3.3 of Watermaster Rules and Regulations.

1 **G. “Discretionary Actions to Amend Watermaster Rules and Regulations” (Resolution**
2 **No. 07-05, Attachment F)**

3 **1. Watermaster Requests Approval under Paragraph 31**

4 Exhibit A, Attachment F to Watermaster’s motion is a document titled Discretionary
5 Actions to Amend Watermaster Rules and Regulations. Watermaster requests the Court to
6 approve the document under Paragraph 31 of the Judgment.

7 **2. Subject Matter of Proposed Amendments**

8 The proposed amendments to Watermaster Rules and Regulations seek to: (1) modify
9 Section 6.3 (c) and add a new section, Section 6.3 (d) to Article VI of the Rules, which pertains
10 to Safe Yield and Operating Safe Yield; (2) modify Section 9.6 of Article IX of the Rules
11 pertaining to transfers; (3) require Watermaster to ratify, by resolution, certain current
12 accounting practices; (4) require Watermaster to impose losses of 6% or 2%, depending on
13 whether or not the party has made contributions to OBMP implementation (the 2% loss will be
14 reduced to less than 1% once Hydraulic Control is achieved); modify Section 8.1(f)(iii) and
15 Section 8.2 (a,) (b) (g) and (h) of Article VIII pertaining to storage; (5) add a new section,
16 Section 3.3, to Article III of the Rules pertaining to monitoring, which would establish a
17 limitations period with regard to correction of errors in documents the parties submit to
18 Watermaster and to information generated by Watermaster; (6) suggest Watermaster may make
19 further conforming changes to the Rules to eliminate any inconsistencies with the Peace II
20 measures.

21 **3. Watermaster Does Not Address the Considerations to be Made by the Court**

22 The argument in support of the proposed changes Watermaster’s Rules and
23 Regulations is found in pages 20- 22 of Watermaster’s motion. The gist of Watermaster’s
24 argument is that the proposed rules are appropriate and are not opposed by any party.
25 Watermaster makes a conclusory statement that the proposed rules are in inconsistent with the
26 Judgment or the Peace Agreement, but there is no analysis to support the conclusion.

27 As discussed in section V.A. above, the standard of review in paragraph 31 of the
28 Judgment requires the Court to: (1) weigh the evidence offered in support of and the mandated

1 action or decision; (2) analyze whether the mandated action or decision is consistent with and
2 promotes the Physical Solution under the Judgment; (3) analyze whether the mandated action or
3 decision is consistent with the protection of the rights of the parties and the general public
4 interest in preservation of the water resources of Chino Basin; and (4) analyze whether the
5 mandated action or decision is contrary to the public policy requiring reasonable and beneficial
6 use of water (California Constitution, Art .X, Sec. 2).

7 Until Watermaster provides the Court with the analysis required under Paragraph 31 of
8 the Judgment, the proposed changes to Watermaster Rules and Regulations should not be
9 approved.

10 **H. Purchase and Sale Agreement – Overlying (Non-Agricultural) Pool (Resolution No.
11 07-05, Attachment G)**

12 **1. Watermaster’s Motion**

13 This agreement is reliant upon proposed amendments to Judgment Paragraph 8 and
14 Exhibit “G”.⁴⁴ Watermaster states that the Purchase and Sale Agreement “. . . will serve as the
15 implementation of the Judgment Amendments.” (Motion p. 17, lns. 1-2) As discussed, above,
16 however, the agreement covers only the one-time transfer of water held in storage by the
17 Overlying (Non-Agricultural) Pool as of June 30, 2007, as well as the agreement’s earmark
18 transfer; Judgment Exhibit “G” authorizes both the one-time transfer and annual transfers from
19 that pool, but Paragraphs 9(a)-(h) appear to apply only to annual transfers. Neither
20 Watermaster’s Motion nor the agreement indicate the actual quantity of water in storage as of
21 June 20, 2007.⁴⁵

22 **2. The Purchase and Sale Agreement Limits Watermaster’s Discretion by
23 Requiring Approval of the Appropriative Pool Before Watermaster Can
24 Purchase Water for Desalter Replenishment from the Overlying (Non-
25 Agricultural) Pool**

26 The agreement provides that the Overlying (Non-Agricultural) Pool will make a quantity

27 ⁴⁴ The Purchase and Sale Agreement is also discussed at Sections IV.B and C, above.

28 ⁴⁵ The agreement includes a signature block only for the Overlying (Non-Agricultural) Pool. It is not clear whether
Watermaster will be a party to the agreement.

1 of water available to Watermaster from water held in storage as of June 30, 2007:

2 . . . Less a ten percent dedication for the purpose of Desalter replenishment [and
3 less the quantity of water transferred pursuant to Paragraph I below [8,530 acre-
feet] . . .

4 (Purchase and Sale Agreement ¶ B) For the one-time transfer from pool storage, the ten percent
5 is “dedicated for desalter replenishment . . . without compensation” to Watermaster. (*Id.* ¶ E)⁴⁶

6 Watermaster can buy the one-time water at a set price for desalter replenishment or a
7 storage and recovery program if Watermaster gives written notice to the pool “. . . and only with
8 the prior approval of the Appropriative Pool . . .” (*Id.* ¶ C) (Paragraph H “Early Termination” is
9 not clear, and there is no definition of what “Early Termination” means in this agreement.) It
10 appears that the Appropriative Pool ultimately would be allowed to purchase the water, with
11 Watermaster serving as the intermediary purchaser from the Overlying (Non-Agricultural) Pool,
12 following the proposed Judgment Exhibit “G” Paragraph 9(a)-(h) process. (*Id.* ¶ H) The
13 Appropriative Pool could apparently refuse to approve Watermaster’s purchase of the one-time
14 water for desalter replenishment, however, and then direct Watermaster to buy the same water
15 for their own use. This arrangement raises the question of whether the agreement is intended to
16 limit the discretion Watermaster now has to purchase this water for desalter replenishment or
17 storage and recovery programs.⁴⁷

18 **I. Peace II Agreement (Resolution No. 07-05, Attachment K)**

19 **1. Watermaster’s Motion**

20 The Peace II Agreement is Attachment “K” to Watermaster’s Resolution 07-05. The
21 Motion requests approval of this document under Judgment Paragraph 31. The document title is
22 “Peace II Agreement: Party Support for Watermaster’s OBMP Implementation Plan, Settlement
23 and Release of Claims Regarding Future Desalters.”

24 The Peace II Agreement addresses issues that were deferred in 2000, when the Peace

25 _____
26 ⁴⁶ Ten percent of the earmark transfer of 8,530 af is also dedicated to Watermaster for desalter replenishment.
(Purchase and Sale Agreement ¶ I)

27 ⁴⁷ Further amendments of Exhibit “G” might be required. The second “Whereas” states that: “Watermaster is
28 evaluating its replenishment needs under the Judgment and several Storage and Recovery opportunities.” Pending
that evaluation, Watermaster arguably should not give up its discretion to purchase the one-time pool water for
desalter replenishment.

1 Agreement was negotiated: future desalters; additional regulation of the use of local storage;
2 continued MZ-1 recharge of 6,500 afa; “Early Transfer” over-allocation to the Appropriative
3 Pool; “Form 7 credits”; accounting errors; “the role of Watermaster in water quality issues”; and
4 Salt Credits. (Motion p. 3, Ins. 21-28, p. 4, Ins. 1-13)

5 The agreement reflects Watermaster’s and IEUA’s efforts to obtain the Basin Plan
6 amendment “. . . that will allow for the expanded use of all water supplies available to the Basin,
7 most particularly recycled water.” (*Id.* p. 4, Ins. 23-24) Compliance with the Basin Plan
8 amendment requires Basin Reoperation to achieve and maintain Hydraulic Control; the Basin
9 Reoperation management strategy entails “. . . the controlled lowering of water levels throughout
10 the Basin in order to create an optimal operating level for the Basin, thereby allowing for the
11 achievement of Hydraulic Control. (*Id.* p. 5, Ins. 25-27)

12 The Peace II Agreement Article V contains the proposed plan to construct the next
13 increment of desalter capacity, which Watermaster states is “not an item requiring further Court
14 approval”. (*Id.* p. 11, ln. 28) Article VIII of the agreement describes “. . .the measures
15 Watermaster will take to continue to develop recharge capacity of the Basin in preparation for
16 the time when the controlled overdraft period is complete.” (*Id.* p. 11, Ins. 23-25) Articles VI
17 and VII address controlled overdraft, “New Yield Attributable to Desalters”, replenishment
18 obligations for the desalters and credits against those obligations, “apportionment” of controlled
19 overdraft, and accounting for losses from storage accounts. Article X provides that obligations
20 arising from the Peace Agreement and OBMP Implementation Plan will have been satisfied by
21 completion of the 10,000 afa (9 mgd) desalter expansion provided for in the Peace II Agreement.

22 Watermaster’s Motion touches on the principal elements of the Peace II Agreement.
23 Under Paragraph 31, Watermaster must provide evidence to support its proposed action, and
24 establish that the proposed action is consistent with the Judgment and its Physical Solution and
25 with California Constitution Article X, Section 2.⁴⁸ Watermaster’s position is that the parties

26 ⁴⁸ As noted in Sections V.A and G, under Paragraph 31, the court must weigh the evidence in support of the
27 mandated action, analyze whether the action is consistent with the Judgment’s Physical Solution and with protection
28 of the parties’ rights and the general public interest in the preservation of basin resources, and whether the action is
contrary to the public policy mandates of California Constitution Article X, Section 2. Watermaster’s Motion does
not clearly address these considerations in these terms.

1 must be allowed “to adapt their stipulated judgment to fit ongoing changing circumstances”, if
2 doing so would be “protective of the Basin itself consistent with Art. X, sec. 2.” (*Id.* p. 16, Ins.
3 2-3)

4 **2. Certain Peace II Agreement Provisions Require Further Explanation and**
5 **Analysis**

6 Future Desalters. Article X effectively declares that all future desalter obligations have
7 been met. If additional desalter capacity were necessary either to preserve Safe Yield or to
8 maintain Hydraulic Control, how would Watermaster proceed? If the Section 5.3 condition
9 subsequent is not satisfied, how will Watermaster proceed?

10 Recharge Commitment. Recharge commitments are included in Section 7.3 and Article
11 VIII. Section 8.3 is a “continuing covenant” which states that:

12 the annual availability of any portion of the 400,000 acre-feet set aside as
13 controlled overdraft as a component of the Physical Solution, is expressly subject
14 to Watermaster making an annual finding about whether it is in substantial
15 compliance with the revised Watermaster Recharge Master Plan pursuant to
16 Paragraphs 7.3 and 8.1 above.

17 Neither Paragraph 7.3 nor 8.1 include a deadline for returning to the court for approval of a
18 revised Recharge Master Plan. Will Watermaster commit to a schedule?

19 “Contingency Plan” Commitment. There is no description of what Watermaster means
20 by a “contingency plan”. Section 7.3 implies that such a plan will provide mitigation for
21 material physical injury caused by Watermaster’s proposed Basin Reoperation. Watermaster’s
22 Technical Analysis, however, finds that no material physical injury will be caused by Basin
23 Reoperation. What is the “contingency plan” and when will Watermaster develop the plan?

24 Future Groundwater Production. As part of Article VIII on recharge, Section 8.2
25 provides for the Watermaster and parties to coordinate on projected water supply needs. There is
26 no discussion of the “caps” issue raised in the Technical Report. Does Watermaster intend to
27 address the potential need to “cap” future production if recharge capacity and replenishment
28 water availability cannot keep pace with future demand?

29 Interpool Intervention. Section 4.4 would allow intervention by a member of the
30 Appropriative Pool into the Overlying (Non-Agricultural) Pool. Why is this necessary, given the

1 availability of Judgment Exhibit “G” Paragraph 6(a)?

2 Initial Schedule. Section 7.2(e) provides that Watermaster:

3 may exercise its discretion to establish a schedule for Basin Re-Operation that
4 best meets the needs of the Parties to the Judgment and the physical conditions of
5 the Basin, including but not limited to such methods as “ramping up”, “ramping
6 down”, or “straightlining”.

6 Watermaster’s “initial schedule” is presumably Attachment “E” to Resolution 07-05. Which of
7 the two tables has Watermaster chosen? Has Watermaster chosen to use “Most Rapid
8 Depletion” or “Proportional Depletion”? Will Watermaster revise whichever table it decides to
9 use to reflect the Technical Report’s reassessment of the volume of New Yield that will be
10 available?

11 Hydraulic Control Determination. The point at which Hydraulic Control would actually
12 be deemed to have been attained is not clear. Hydraulic Control can be found to exist now to
13 some extent, but would be more “robust” with increased mining of the basin. Watermaster’s
14 Motion is silent on the issue of what the RWQCB would consider to be “Hydraulic Control” for
15 purposes of the 2004 Basin Plan Amendment, and no declaration has been provided on that
16 issue.

17 General. Other Peace II Agreement issues are noted throughout these Preliminary
18 Comments and Recommendations.

19 **J. Peace Agreement Second Amendment (Resolution No. 07-05, Attachment L)**

20 **1. Watermaster’s Motion**

21 Watermaster proposes two amendments to the Peace Agreement: (1) Amend Section
22 5.4(d) (credits against future OBMP assessments) to limit the availability the credit to subsidence
23 issues;⁴⁹ and (2) increase the “cap” on the quantity of water held in “Local Storage” Agreements
24 from 50,000 acre-feet to 100,000 acre-feet (Sections 5.2(b) iv and vii) and remove the
25 “rebuttable presumption” that “Material Physical Injury” would not be caused by the storage
26

27 ⁴⁹ Watermaster does not provide a redline version of Section 5.4(d). The words “. . . including but not limited to
28 those facilities relating to [the prevention of subsidence] . . .” would be replaced by the words: “. . . and specifically
relates to [the prevention of subsidence] . . .”

1 (Section 5.2(b) v). (Motion p. 18, Ins. 1-20) As to the OBMP credit amendment, “. . . the Court
2 should respect the desires of the parties and approve it.” (*Id.* ln.11) As to the higher cap on
3 Local Storage accounts, the question for the court is “. . . whether there is any reason not to allow
4 this amendment.”⁵⁰ (*Id.* Ins. 15-16)

5 **2. Amendments to the Peace Agreement Should Be Held to the Same Standard**
6 **as Was the Peace Agreement Itself**

7 As noted in Watermaster’s Motion, the court ordered Watermaster to proceed in a manner
8 consistent with the Peace Agreement and the OBMP Implementation Plan upon making the
9 finding that the Peace Agreement was consistent with the OBMP and was in furtherance of the
10 Judgment’s Physical Solution and California Constitution Article X, Section 2. (Motion p. 3,
11 Ins. 3-7, citing the Court’s 7/13/2000 Order.) This was the correct standard in 2000, and is the
12 correct standard to be applied here. That said, there is no apparent reason that the amendment to
13 Section 5.4(d) should not be allowed.

14 **3. Watermaster Has Not Evaluated the Issue of Local Storage Limits as**
15 **Required by the Peace Agreement, Watermaster Rules and Regulations, and**
16 **the OBMP Implementation Plan**

17 Peace Agreement Section 5.2(b)(xi), Watermaster Rules and Regulations Section 8.2(j)
18 and OBMP Implementation Plan Program Element 8(b)(xi) provide that:

19 Watermaster shall evaluate the need for limits on water held in Local Storage to
20 determine whether the accrual of additional Local Storage by the parties to the
21 Judgment should be conditioned, curtailed or prohibited if it is necessary to
22 provide priority for the use of storage capacity for those Storage and Recovery
23 Programs that provide broad mutual benefits to the parties to the Judgment as
24 provided in this paragraph and section 5.2(c) of the Peace Agreement. [Peace
25 Agreement § 5.2(b)(xi).]

26 Watermaster’s Motion does not indicate that any evaluation has occurred, and Watermaster’s
27 Technical Report does not appear to address Local Storage or Carryover Storage water.

28 The implementation of Local Storage account limits was discussed extensively in the

⁵⁰ Watermaster also argues that if the amendment “. . . is uncontested, the Court should demand that a compelling
reason would need to be shown for the Court not to respect the unanimous wishes of the parties.” (Motion p. 18,
Ins. 19-20) Further: “Review of the proposed Peace Agreement amendments is brought under Paragraph 31 of the
Judgment, though the essential issue with regard to these amendments is whether they have the consent of all parties
to the Peace Agreement.” (*Id.* p. 8, Ins. 21-23) Amendment of the Peace Agreement does require the unanimous
consent of the parties. (Peace Agreement Section 14(b))

1 1999 OBMP Phase I Report.⁵¹ Watermaster has not reviewed for the court its reasons for
2 proposing the 50,000 acre-foot cap in the Peace Agreement, has not provided any technical or
3 modeling analysis of the storage issue or evaluated the need for increasing or decreasing the cap,
4 has not articulated the “trade-offs” between increased Local Storage and increased Storage and
5 Recovery programs, and has not revisited the issue of water being held in Local Storage accounts
6 for periods of time which frustrate the reasonable and beneficial use of water.⁵²

7 VI. FOUNDATIONAL ISSUES

8 A. Is the Technical Report Baseline Alternative Consistent with the Judgment and Its 9 Physical Solution?

10 1. Baseline Alternative

11 If there is an “elephant in the room” with respect to the Judgment and Watermaster’s
12 basin management pursuant to the Physical Solution, it is the following problem described in the
13 Technical Report:

14 The integrated regional water planning process for the Chino Basin area needs to
15 be improved to be consistent with the limitations in the groundwater system and
16 the regional facilities. In past planning studies, the parties have assumed that they
17 could pump as much as they desired from anywhere they wanted to pump in the
18 basin and that Watermaster would always be able to replenish overproduction
19 regardless of the magnitude of overproduction. This is best illustrated through the
20 process of developing the Baseline Alternative for the investigation of the Peace
21 II project description.

22 (Final Technical Report p. 8-1)

23 The Baseline Alternative is Watermaster’s baseline for analysis of its Basin reoperation
24 alternatives. The Technical Report explains that “Several iterations were required to develop a
25 feasible Baseline Alternative.” (Final Technical Report p. 8-2) The report describes the
26 iterations in detail, that groundwater production plans had to be “modified” several times and the

27 ⁵¹ See OBMP Phase I Report, pp. 2-12 *et seq.* and 4-32 *et seq.* The two “fundamental reasons why storage limits
28 should be considered” were that “accumulation in local storage accounts in quantities that cannot be put to a
reasonable beneficial use is in conflict with Section 2 of Article X of the California Constitution . . .” and the
“cumulative losses of water from local storage accounts can grow to be large . . .” (*Id.* p. 4-33)

⁵² Ironically, Watermaster seeks to increase the Local Storage account cap without addressing this historical
Watermaster concern, but seeks to amend the Judgment to remedy the problem of stranded Overlying (Non-
Agricultural) stored water.

1 replenishment plan had to be “adjusted”. One “surprising result” was that: “. . . the safe yield
2 would decline from the 140,000 acre-ft/yr determined in the Judgment to slightly less than
3 120,000 acre-ft/yr by 2059/66.” (*Id.*) Another “surprising result” was that the expanded future
4 groundwater production (even though “modified” several times to reduce future production)
5 “resulted in a large groundwater level depression centered in the . . . north-central part of the
6 Basin . . .”, with groundwater elevations falling by over 100 feet in some well fields. (*Id.*) To
7 “. . . prevent individual model cells from drying up . . .”, future net groundwater production by
8 CVWD and the City of Ontario was further “capped” at certain levels.

9 The Baseline Alternative is used as the metric against which Watermaster assesses its
10 Reoperation Alternatives 1A and 1B. In order to be able to complete the simulation of Baseline
11 conditions, groundwater production projections had to be modified (and replenishment nudged
12 up to 104,000 afa, even though capacity right now is 61,000 afa). The “modifications” are
13 substantial. To fit within the 104,000 afa replenishment number, future production projections
14 were capped at 205,166 afa beginning in 2024/25 (Technical Report Table 7-8) versus the Black
15 and Veatch projections of 264,500 afa (*id.*, Table 7-1). (These projections include desalters and
16 “Pomona Nitrate”.) Table 7-8 holds future pumping at the 205,166 afa level through 2059/60;
17 there is, therefore, no increase in production in the Baseline alternative after 2019/20.⁵³ When
18 the City of Ontario and CVWD production is further “capped” at 29,000 afa and 23,800 afa,
19 respectively, their projected pumping reflects an additional reduction to the Table 7-8 quantities.
20 It appears that, with those additional reductions, Baseline pumping would be constrained to just
21 189,000 acre-feet per year from 2024/25 on.⁵⁴

22 The Technical Report’s Baseline Alternative projected pumping from 2024 through
23 2059/60 is apparently limited to 189,000 afa. This number does not appear to be discussed in the
24 text of the Technical Report, nor in Mr. Wildermuth’s declarations. This is a full 75,500 afa less
25 than the Table 7-1 projections based on the parties’ 2005 Urban Water Management Plans.

26 _____
27 ⁵³ By 2019/20, production projections reach a maximum of 207,257 afa (Table 7-8) and decline to 205,166 by
2024/25 and remain unchanged until 2059/60.

28 ⁵⁴ This total is 205,166 afa less the difference between the Table 7-8 totals for Ontario and CVWD (35,133 and
33,846) at 2024/25 and the caps (29,000 and 23,800); 205,166 less 16,179 equals 188,987.

1 **2. Baseline Alternatives Assumptions Have Not Been Agreed to by the Parties**
2 **or Watermaster**

3 The Technical Report and Mr. Wildermuth's declarations make it clear that the parties
4 have not agreed to these "modifications":

5 The production projections used in the initial evaluations of the planning
6 alternatives are shown by party in Table 7-8. These projections should be
7 characterized as "net" production projections. That groundwater production has
8 been reduced in the groundwater simulations from prior planning investigations
9 does not necessarily mean that total production would actually be reduced.
10 Watermaster and others could expand the replenishment capacity, or the
11 Appropriators could increase recharge capacity on their own through the
12 construction of aquifer storage and recovery (ASR) wells. ASR wells could be
13 used to inject treated SWP water when SWP water is available and there is
14 surplus treatment plant capacity.

15 (Final Technical Report p. 7-10)⁵⁵ Watermaster does not discuss these constraints, nor does it
16 attempt to translate these constraints into prospective recharge capacity requirements.

17 Mr. Wildermuth states that it ". . .was outside the scope of my investigation to optimize
18 the groundwater production patterns and associated replenishment." (Wildermuth Declaration p.
19 4, Ins. 2-3) More specifically as to the Baseline Alternative assumptions, Mr. Wildermuth
20 explains that he made what he believed to be reasonable assumptions on "some collateral
21 subjects" since he had to impose limits on pumping if he was only allowed to model "presently
22 planned for recharge capacity and expected availability of water . . .":

23 I have also received several questions regarding some collateral subjects that were
24 included within the report but were in large part, beyond the scope of the study.
25 For example, questions have been raised as to several assumptions such as my
26 decision to limit certain groundwater production by some of the producers. I
27 never contemplated actually limiting the production of any specific party. To the
28 contrary, I simply made what I believe to be a reasonable assumption that given
the presently planned for recharge capacity and expected availability of water for
recharge, there would be physical limitations on how much water could be
produced by individual agencies. I began with the production expectations of the
parties that are reflected in their published urban water management plans. I then
adjusted those projections by what I understand the physical limitations on actual
production will be unless and until expanded recharge capability is provided.
This expanded recharge capability might be provided through more efficient use
of existing facilities, new recharge basins, and more expansive use of recycled
water. However, it is more likely that the most efficient and cost-effective
approach to expand recharge will be the use of ASR.

⁵⁵ The same production (and safe yield) projections were used in the simulations for Alternatives 1A and 1B.

1 (*Id.* p. 9, lns. 22-28)

2 The Technical Report’s analysis thus substantially limited future projected pumping in
3 order to stay within “presently planned for recharge capacity and expected availability of water.”
4 The suggested solution – increasing recharge capacity over time – has not been agreed to yet by
5 Watermaster and the parties. The Technical Report and supporting modeling work do not
6 disclose whether (and to what extent) recharge can be increased and still achieve and maintain
7 Hydraulic Control.⁵⁶ There has been no technical work or modeling presented in support of the
8 Peace II documents which demonstrates what would be required and the feasibility of increasing
9 recharge to the basin in order to allow pumping not to be constrained.

10 **3. Judgment “Fundamental Premise”**

11 The Judgment provides:

12 A fundamental premise of the Physical Solution is that all water users dependent
13 upon Chino Basin will be allowed to pump sufficient waters from the Basin to
14 meet their requirements. To the extent that pumping exceeds the share of the Safe
15 Yield assigned to the Overlying Pools, or the Operating Safe Yield in the case of
16 the Appropriative Pool, each pool will provide funds to enable Watermaster to
17 replace such overproduction.

18 (Judgment ¶ 42) This “fundamental premise” was discussed in detail in Watermaster’s Post-
19 Trial Memorandum:

20 The Physical Solution is the heart of the Judgment. It is essential to
21 understanding of the Physical Solution that it be recognized that there is sufficient
22 water to meet the needs of all of the parties. This is because there are significant
23 imported water supplies available to supplement the native Safe Yield of the
24 basin. However, the supplemental waters are significantly more expensive than
25 local ground waters. Accordingly, the function of the Judgment, and of its
26 Physical Solution, is to provide an equitable and feasible method of assuring that
27 all parties share in the burden of the costs of importing the necessary
28 supplemental water to achieve a hydrologic balance within Chino Basin.

29 The Physical Solution provides the mechanics by which the management plan is
30 implemented. The basic concept of the Physical Solution is similar to that
31 adopted in the prior ground water adjudications in Southern California, i.e., the
32 parties are entitled to produce their requirements for ground water from the basin,
33 provided that they contribute, by Watermaster assessments, sufficient money to
34 assure purchase of supplemental water to replace any aggregate production in
35 excess of the Safe Yield. It is in the detailed formulation of that Physical Solution
36 that some of the most interesting features of the Judgment were developed.

37
38 ⁵⁶ See discussion, below, at Section VI.C.

1 (Post-Trial Memorandum (7/11/1978) p. 4, lns 21-28, p. 5, lns. 1-14)

2 **4. “Capping” Production Is Not Consistent with this Central Premise of the**
3 **Judgment’s Physical Solution.**

4 If production must be “capped” because Watermaster is unable to recharge sufficient
5 quantities of water to replace overproduction, that eventuality must be fully analyzed and
6 considered. The “modifications” and “adjustments” required to reach a “Baseline Alternative”
7 which did not run wells dry strongly suggests that this fundamental premise – that Watermaster
8 will be able to obtain sufficient water and will have sufficient replenishment facilities to replace
9 overproduction – is now called into question.

10 Watermaster’s Motion touts the proposed Basin Reoperation management strategy as a
11 strategy that will “. . . create an optimal operating level for the Basin, thereby allowing for the
12 achievement of Hydraulic Control . . .” (Motion p. 5, lns. 26-27), that “. . . *optimizes* the Basin
13 . . . makes the Basin work better, for all of the parties to the Judgment and for the future
14 generations that will depend on the Basin.” (*Id.* p. 22, lns. 22-21)

15 Basin reoperation for Hydraulic Control is the focus of these claims,⁵⁷ but the
16 assumptions that had to be used in the technical work clearly do not support any conclusion that
17 there has been “optimization” of overall basin management. Indeed, the logical task to “optimize
18 the groundwater production patterns and associated replenishment” was outside the scope of the
19 Technical Report and modeling. As a result, every alternative rests on the arbitrary capping of
20 future groundwater production – which is not consistent with the Judgment’s “fundamental
21 premise”. This should be addressed; in no way should this issue be marginalized as a “collateral
22

23 ⁵⁷ It is not clear whether Watermaster’s Technical Report has attempted to “optimize” for any parameter. Modeling
24 of reoperation alternatives indicates that “a more robust state of hydraulic control” can be rapidly achieved and
25 maintained. (Final Technical Report p. 8-5) Technical Report Section 8 does not discuss whether the use and
recharge of recycled water is optimized, nor does it mention recycled water. Section 7 discusses the fact that
Hydraulic Control is required by the RWQCB for IEUA’s recycled water to be used for irrigation and groundwater
recharge without “mitigation”:

26 Without hydraulic control, the IEUA and Watermaster will have to cease the use of recycled water
27 in the Chino Basin and will have to mitigate the effects of using recycled water back to the
adoption of the 2004 Basin Plan Amendment, which occurred in December 2004.

28 (*Id.* p. 7-2) In a sense, therefore, if the Peace II Measures optimize anything, they optimize the use of recycled water
through Hydraulic Control.

1 subject”. If Watermaster “never contemplated actually limiting the production of any specific
2 party”, but the Technical Report and modeling work assume production limitations, can the
3 analysis be valid?

4 **B. Why Is Safe Yield Projected to Continue to Decline and How Can Watermaster
5 Operate the Basin to Avoid This Result?**

6 **1. Watermaster’s Motion**

7 Watermaster’s Motion states that through the “Peace II Measures” Watermaster will
8 accomplish three things: (1) “. . . curtail the discharge of poorer water quality to the Santa Ana
9 River”; (2) “. . . [p]rovide planning and economic stability” for new desalter capacity; and (3)
10 “. . . preserve material quantities of Basin yield against projected declines . . .” (Motion p. 1, Ins.
11 25-27) Based on Watermaster’s Technical Report, the Motion reports that:

12 . . . Watermaster has determined that the Basin Re-operation strategy as described
13 in the Project Description [Resolution 07-05 Attachment “A”] is a beneficial
14 strategy to the Basin that will advance the OBMP goals of yield enhancement and
protection and that Basin Re-operation is necessary in order to achieve Hydraulic
Control . . . and will not result in Material Physical Injury.

15 (*Id.* p. 13, Ins. 13-17; emphasis added) Watermaster argues: “The Basin Re-operation strategy is
16 consistent with the OBMP because it accomplishes the goal of yield protection and yield
17 maximization.” (*Id.* p. 16, Ins. 1-12; emphasis added)

18 The language in the first-quoted statement, above, that refers to preserving yield “against
19 projected declines” is the Motion’s only reference to the Technical Report’s “surprising result”
20 that safe yield is – apparently for the first time – projected to decline, and to decline
21 substantially.⁵⁸ This is a startling change, but Watermaster’s Motion does not address this issue.

22 **2. Technical Report and Analysis of the Projected Decline in Safe Yield**

23 In describing the “proposed project” of expanding the desalter program to 40,000 acre-
24 feet per year of desalter pumping and the strategic reduction in groundwater storage
25 (reoperation) to achieve Hydraulic Control, the Final Technical Report states:

26
27 ⁵⁸ “The first complete simulations of the Baseline Alternative produced a surprising result: the safe yield would
28 decline from the 140,000 acre-ft/yr determined in the Judgment to slightly less than 120,000 acre-ft/yr by 2059/60.”
(Final Technical Report p. 8-2)

1 Through Re-operation and pursuant to a Judgment Amendment, Watermaster will
2 engage in controlled overdraft and use up to a maximum of 400,000 acre-ft to
3 offset desalter replenishment through 2030. After the 400,000 acre-ft is
4 exhausted and the period of Re-operation is complete, Watermaster will
5 recalculate the safe yield of the basin. The Re-operation period will have no
6 impact on the Operating Safe Yield or on the Parties' respective rights thereto.

7 (Final Technical Report p. 7-4; emphasis added)

8 The effect of controlled overdraft of 400,000 acre-feet was not known until the many
9 baseline simulations were run:

10 Nineteen baseline simulations were required to obtain a Baseline Alternative that
11 was consistent with Chino Basin Judgment and the recharge capacity available to
12 the Watermaster for replenishment operations and allow sustainable production.
13 The hydrology incorporated in the new model and the production projection
14 resulted in a reduction in the future operating yield in the Baseline Alternative.

15 (Wildermuth Declaration #2 p. 3, lns. 15-18; emphasis added) It was in the “preliminary
16 simulations” of the Baseline Alternative that:

17 . . . it was discovered that the safe yield of the basin was declining steadily from
18 about 140,000 acre-ft/yr to about 116,000 acre-ft/yr. Starting in 2010/11, the safe
19 yield was estimated each year and the associated replenishment obligation was
20 estimated based on the safe yield. . . Reducing the safe yield in the planning
21 alternatives results in a greater replenishment obligation than [previously]
22 estimated. . . The Baseline Alternative was simulated with the new time history
23 of the safe yield and the revised replenishment capacity.

24 (Final Technical Report p. 7-11)⁵⁹

25 The Technical Report tersely accounts for the projected decline in Safe Yield, noting:

26 The safe yield declines due to the reductions in the deep percolation of applied
27 water and precipitation and the reduction in storm water recharge. The reduction
28 in recharge is caused by historical and projected changes in land use and
associated water use patterns from the conversion of agricultural and vacant land
uses to urban uses through 2025.

(*Id.* p. 7-19) Mr. Wildermuth expanded on this explanation:

The safe yield declines due to the reductions in the deep percolation of applied
water and precipitation and the reduction in storm water recharge. The reduction
in recharge is caused by historical and projected changes in land use and
associated water user patterns from the conversion of agricultural and vacant land
uses to urban uses through 2025. Since we published the Draft Report and
distributed it for comment, we have received some comments regarding some of
our observations and data in the report, particularly as it relates to the Baseline
Alternative. Concern has been expressed about certain conditions in the Basin
that will prevail regardless of whether Watermaster pursues Re-operation. The

⁵⁹ See Table 7-9 and Figure 7-13 which show the magnitude of the projected Safe Yield decline.

1 most prominent subject for discussion is the 2007 Model's prediction that
2 operating safe yield will be reduced from the present assumed levels. Recharge to
3 the Basin is being impacted by urbanization and the armoring of the Basin. The
4 potential reduction in operating safe yield is worse without Re-operation. With
5 Re-operation, the 2007 Model predicts that operating safe yield will be
6 approximately 8,600 to 9,000 acre-feet per year higher. Moreover, the model
7 does not take into account pro-active measures that might be prudently
8 undertaken by Watermaster to expand recharge capability through recharge
9 improvements including aquifer, storage and recovery projects.

6 (Wildermuth Declaration #2 p. 8, Ins. 2-5, 15-25)

7 Mr. Wildermuth concludes that because "... the potential reduction in operating safe
8 yield is more without Re-operation", and because "... there are no reductions in yield projected
9 for Alternatives 1A and 1B relative to the Baseline Alternative ...", that "... there is no
10 material injury related to safe yield changes".⁶⁰ (*Id.* p. 8, Ins. 10-12) Further: "In my opinion,
11 the safe yield changes associated with Alternatives 1A and 1B are consistent with the goal of the
12 OBMP to protect and enhance the safe yield of the Basin." (*Id.* p. 8, Ins. 12-14)

13 Mr. Wildermuth does not offer his opinion as to whether the overall decline in safe yield
14 can be characterized as consistent with the OBMP goal of safe yield protection and
15 enhancement. There is no discussion or analysis of whether and how the safe yield decline can
16 be averted and the key OBMP goal met overall. By the same token, there is no discussion or
17 support for the Technical Report's claim that there will be no impact on the Operating Safe Yield
18 or on the parties' "respective rights thereto"; obviously, the Technical Report shows a continuous
19 decline in Safe Yield (and the model includes an ongoing decline in production rights in its
20 determination of replenishment obligations).

21 _____
22 ⁶⁰ Neither Mr. Wildermuth nor Watermaster's Motion point out that the Peace II Agreement Section 7.1 prohibits
23 incorporation of New Yield attributable to the desalters as Safe Yield until 2030:

23 New Yield Attributable to Desalters. Watermaster will make an annual finding as to the quantity
24 of New Yield that is made available by Basin Re-Operation including that portion that is
25 specifically attributable to the Existing and Future Desalters. . . Any subsequent recalculation of
26 New Yield as Safe Yield by Watermaster will not change the priorities set forth above for
27 offsetting Desalter production as set forth in Article VII, Section 7.5 of the Peace Agreement. For
28 the initial term of the Peace Agreement, neither Watermaster nor the Parties will request that Safe
29 Yield be recalculated in a manner that incorporates New Yield *attributable to the Desalters* into
30 the determination of Safe Yield so that this source of supply will be available for Desalter
31 Production rather than for use by individual parties to the Judgment.

27 Because the parties and Watermaster have agreed not to include New Yield in Safe Yield until after 2030, there
28 would be no difference between the Baseline Alternative and Alternatives 1A and 1B safe yield; the finding of no
Material Physical Injury rests on there being a difference.

1 **3. The OBMP’s Focus on Maintaining Pumping in the Southern Chino Basin**
2 **Was to Preserve Safe Yield**

3 Watermaster’s Motion notes that “. . . continued commitment to this element of the
4 OBMP [future desalters] was of major concern to the Court.” (Motion p. 14, ln. 24) The court’s
5 concern was directly related to maintaining safe yield – the focus at that time was not on
6 achieving hydraulic control.

7 The 1999 OBMP Phase I Report included detailed discussion of the need to maintain safe
8 yield by pumping and desalting in the Southern Chino Basin:

9 Agricultural production is projected to decrease about 40,000 acre-ft/yr when
10 current agricultural land use transitions to urban use. If the magnitude and spatial
11 distribution of current agricultural production is not replaced with new production
12 then the yield of the Chino basin will decrease by a comparable amount.

13 (1999 OBMP Phase I Report p. 2-17) Further:

14 Groundwater production in the southern half of the Basin will need to be
15 managed to ensure that safe yield is not reduced as agricultural areas convert to
16 urban uses. Losses in safe yield due to decreases in agricultural production in the
17 southern part of the Basin are distributed among the appropriators based on their
18 initial share of safe yield. Thus, the loss in yield is translated throughout the
19 Basin. Increasing production near the Santa Ana River could enhance existing
20 safe yield.

21 (*Id.* p. 2-37) The OBMP Implementation Plan Program Element 3 echoed this concern:

22 As urbanization of the agricultural areas of San Bernardino and Riverside
23 counties in the southern half of the Basin occurs, the agricultural water demands
24 will decrease and urban water demands will increase significantly. Future
25 development in these areas is expected to be a combination of urban uses
26 (residential, commercial, and industrial). The cities of Chino, Chino Hills, and
27 Ontario, and the Jurupa Community Services District (JCSD) are expected to
28 experience significant new demand as these purveyors begin serving urban
29 customers in the former agricultural area. Based on current estimates of
30 overlying agricultural pool production, it is expected that at least 40,000 acre-ft/yr
31 of groundwater will need to [be] Produced in the southern part of the Basin to
32 maintain the safe yield. . . There is approximately 48,000 acre-ft/yr of
33 agricultural production in the southern part of the Chino Basin in the year 2000,
34 and this production will reduce to about 10,000 acre-ft/yr in the year 2020 at
35 build-out. This decline in agricultural production must be matched by new
36 production in the southern part of the Basin or the safe yield in the Basin will be
37 reduced. . . Groundwater production for municipal use will be increased in the
38 southern part of the Basin to: meet the emerging demand for municipal supplies
39 in the Chino Basin, maintain safe yield, and to protect water quality in the Santa
40 Ana River. A preliminary facility plan (Revised Draft Water Supply Plan Phase I
41 Desalting Project Facilities Report) was prepared in June, 2000, that describes the
42 expansion of the Chino I Desalter and the construction of the Chino II Desalter to

1 be built in the JCSD service area (Attachment I). New southern Basin production
2 for municipal use will require desalting prior to use.

3 (OBMP Implementation Plan (Peace Agreement Exhibit "B) pp. 23-24) If basin reoperation will
4 not maintain Safe Yield, as forecast by the OBMP, Watermaster should provide a complete
5 technical analysis and explanation for that "surprising result".

6 **4. Watermaster Should Undertake a Complete Technical Analysis of the**
7 **Projected Safe Yield Decline**

8 As recently as December 2006, Watermaster's technical analysis of Peace II future
9 replenishment and desalter plans determined that all desalter pumping and desalter replenishment
10 plans then being evaluated produced Safe Yield estimates exceeding 152,000 afa. (Addendum to
11 the Draft April 2006 Report Analysis of Future Replenishment and Desalter Plans Pursuant to
12 the Peace Agreement and the Peace II Process, p. 3-3) The December 2006 Report notes that the
13 "... purpose of the OBMP desalting program is to maintain and enhance the safe yield of the
14 basin by controlling groundwater discharge to the Santa Ana River." Further:

15 The original desalting plan incorporated in the OBMP and the Peace Agreement
16 was meant to replace agricultural pumping, which in essence maintains the safe
17 yield. At full replenishment, the desalters are simply replacing agricultural
18 pumping and the yield will eventually be about 152,000 acre-ft/yr (equal to the
19 140,000 acre-ft/yr of safe yield per the Judgment and 12,000 acre-ft/yr of
20 additional yield from new stormwater recharge). The only way to generate
21 permanent additional new yield is to operate the basin at an increased operating
22 yield. With this operation, the storage in the basin will drop as the yield builds up
23 until a new equilibrium is reached. In implementation, this means doing less
24 replenishment and reducing the groundwater storage in the basin.

21 (*Id.* p. 4-1) This safe yield picture has changed, as described in Watermaster's Final Technical
22 Report.

23 Mr. Wildermuth attributes the surprising projected decline in Safe Yield to historical and
24 projected changes in land use and associated water use patterns. The Judgment actually defines
25 "Safe Yield" as:

26 The long-term average annual quantity of ground water . . . which can be
27 produced from the Basin under cultural conditions of a particular year without
28 causing an undesirable result.

(Judgment ¶ 4(x)) "Cultural conditions" is not a defined term, but logically includes land use

1 changes.

2 Land uses and associated water use patterns already have changed very substantially, as
3 described in the 1999 OBMP Phase I Report, Table 207. Watermaster has provided no
4 comparable analysis which might explain why “urbanization and armoring” of the basin are now
5 suddenly seen as causing a decline in Safe Yield. What “cultural conditions” have or will so
6 substantially change since the 1999 analysis, or even the December 2006 Report?

7 There are other potential causes that have been noted in previous Watermaster technical
8 work. For example, the 1999 Report discusses the linkage between Safe Yield and groundwater
9 storage:

10 Estimating groundwater storage within the Chino Basin is a critical exercise
11 because of the direct influence of storage upon the safe yield and reliability of the
12 aquifer. The safe yield of a groundwater basin approximates the average annual
13 recharge in a basin if the storage in the basin is large. The larger the storage, the
14 more reliable the basin will be in dry period. the amount of water in storage in
15 the Chino Basin is directly proportional to groundwater level.

16 (1999 OBMP Phase I Report p. 2-10; emphasis added)

17 The 1999 Report described the “time history of groundwater storage for the basin”, from
18 1933 (6,300,000 af) through 1997 (5,300,000 af):

19 Groundwater storage decreased by about 1,000,000 acre-ft during the 64-year
20 period of 1933 to 1997. . . The lowest level of groundwater storage during the
21 period 1960 to the present occurred in 1977 at the end of a 33-year drought. Prior
22 to 1977, groundwater storage was falling at a rate of about 25,500 acre-ft/yr. The
23 decline in storage was due to drought and groundwater production in excess of
24 sustainable yield. The period of 1978 through 1983 was an extremely wet period.
25 The physical solution with the Chino Basin Judgment was implemented in 1978.
26 The end of the drought and the elimination of basin-wide overdraft caused an
27 increase in storage. Table 2-1 shows the change in storage relative to 1977 (the
28 lowest level of storage) for the period 1965 to 1997. The losses in storage that
occurred during the period 1965 to 1977 have been partially offset by gains in
storage that occurred after 1977.

(*Id.* p. 2-11)⁶¹

Watermaster’s Technical Report indicates that the model has been used to calculate
change in storage (Final Technical Report p. 7-13), but discusses only the 198,000-212,000 af

⁶¹ See 1999 OBMP Phase I Report, Table 2-1 and Figures 2-25 and 2-26.

1 change in storage resulting from the “shortfall” in New Yield as of 2029/30. (*Id.*) Watermaster
2 should provide a complete technical analysis of projected change in storage attributable to basin
3 reoperation and subsequently maintaining Hydraulic Control (through 2059/60), and an
4 assessment of the relationship between projected changes in storage and the projected decline in
5 safe yield.

6 Finally, it is clear from the Technical Report Table 7-9 and Figure 7-13 that Watermaster
7 can and has projected safe yield on an annual basis. Watermaster should provide a complete
8 explanation of how it will adjust its replenishment obligations to reflect future declining safe
9 yield. If safe yield is not recalculated annually, Watermaster should propose how it will “true
10 up” for actual Safe Yield.⁶²

11 **C. To What Extent Can Recharge Be Increased to Maintain Safe Yield and Still**
12 **Achieve and Maintain Hydraulic Control?**

13 **1. The Technical Report Does Not Answer This Question**

14 The scope of the Technical Report was limited in several respects. The scope did not
15 include “. . . the planning, design, permitting and construction of expanded recharge facilities
16 . . .”; those issues “. . . will be comprehensively addressed in the recharge master planning effort
17 that is contemplated by the Peace II Measures.” (Wildermuth Declaration #2 p. 10, Ins. 10-13)
18 Because recharge capacity was constrained, the Technical Report and modeling have not
19 addressed the question of whether and to what extent replenishment can be increased without
20 interfering with achieving and maintaining Hydraulic Control.

21 **2. Watermaster Should Undertake a Complete Technical Analysis of the**
22 **Expanded Recharge Versus Hydraulic Control Question**

23 The Technical Report makes assumptions with regard to recharge capacity: (1) current
24 recharge capacity is 61,000 afa; (2) by mid-2008, 91,000 afa of recharge capacity will be
25 available to Watermaster; (3) by reducing periodic maintenance from three to two months, the

26 _____
27 ⁶² When safe yield was increasing (rather than decreasing, as projected), the consequence was that basin storage
28 increased slightly. With declining safe yield, however, a lower safe yield must be reflected in determining
replenishment needs. If that is not done, basin overdraft will increase. Watermaster should commit to replenishing
in accordance with the declining safe yield, which can and should be recalculated annually.

1 91,000 afa of capacity will expand to 104,000 afa; (4) replenishment water will be available to
2 Watermaster 80 percent of the time; (5) replenishment for any overproduction (in excess of
3 Operating Safe Yield) in Dry Year Yield Program (“DYYP”) “take” years has been included in
4 the evaluation of recharge capacity. (Final Technical Report pp. 7-7 *et seq.*) Using these
5 assumptions, basin reoperation apparently achieved and maintained Hydraulic Control.

6 If significantly more recharge capacity is made available, will substantially expanded
7 replenishment interfere with hydraulic control? If, for example, the assumptions that water for
8 replenishment will be available for ten out of twelve months in eight out of ten years are overly
9 optimistic, and substantially more recharge capacity is therefore required, would less frequent
10 but much larger replenishment volumes interfere with hydraulic control?

11 Watermaster and the parties have not committed to expand recharge facilities (except,
12 apparently, to increase recharge capacity to 91,000 afa by mid-2008).⁶³ Whether or not there is a
13 present commitment to plan and implement future expansions of recharge capacity, Watermaster
14 should at least perform the complete technical assessments and modeling needed to explain the
15 relationships between recharge capacity, replenishment volumes, safe yield, maintaining
16 hydraulic control, groundwater production, and groundwater levels.

17 **D. To What Extent Can Storage and Recovery Programs Be Undertaken and Still**
18 **Achieve and Maintain Hydraulic Control?**

19 **1. The Technical Report Does Not Answer This Question**

20 The Watermaster Resolution 07-05 Attachment “A” Project Description notes that there
21 currently is only one 100,000 af DYYP storage program with Metropolitan Water District of
22 Southern California (“Metropolitan”). Expanding the DYYP has been under consideration:

23 Metropolitan, the IEUA, and Watermaster are considering expanding this
24 program an additional 50,000 acre-ft to 150,000 acre-ft over the next few years.
25 Watermaster is also considering an additional 150,000 acre-ft in programs with
26 non-party water agencies. The total volume of groundwater storage allocated to
27 storage programs that could overlay the proposed project is about 300,000 acre-ft.

28 ⁶³ The Attachment “A” Project Description states at page 6 that expansion of recharge capacity “. . . will occur independently from the proposed project.” The “required recharge capacity to meet future replenishment obligations is about 150,000 acre-ft, a capacity expansion of about 59,000 acre-ft/yr [over 91,000 afa current supplemental water recharge capacity].”

1 These storage programs, if not sensitive to the needs of hydraulic control, could
2 cause groundwater discharge to the Santa Ana River and result in non-compliance
3 with hydraulic control and a loss in safe yield. There have been no planning
4 investigations that articulate how the expansion from the existing 100,000 acre-ft
program to the future 300,000 acre-ft set of programs will occur and thus this
expansion is not included herein.

5 (Attachment "A" Project Description p. 6) Although confusing, this excerpt suggests that a total
6 400,000 af DYYP is under consideration, that Hydraulic Control and Safe Yield could be
7 affected, and that the Peace II documents and Watermaster's Technical Report do not include
8 any expansion of the DYYP because there are "no planning investigations that articulate how the
9 expansions will occur. . ."

10 The Technical Report repeats the quoted statement, adding:

11 The proposed project will be analyzed with the existing 100,000 acre-ft DYYP
12 because the facilities and operational plans to expand beyond the 100,000 acre-ft
program have not been described in sufficient detail for credible analysis.

13 (Technical Report p. 7-5) The 100,000 DYYP is included in the Baseline and Alternatives 1A
14 and 1B. (*Id.* p. 7-9) Table 7-7 "illustrates the put and take assumptions that have been
15 incorporated into the investigation . . ." (*Id.*), and Figure 7-6 "illustrates the time histories of
16 groundwater pumping, replenishment, and replenishment balance . . ." for Watermaster's
17 modeling simulations. (*Id.* p. 7-10) To run the simulations, Watermaster assumed that the:

18 . . . DYYP starts with a take period in fiscal 2008/09 for two reasons: first the
19 DYYP account has already been almost completely filled ($\approx 90,000$ acre-ft); and
20 it is likely, given the projected rainfall for 2007/08, that Metropolitan may make a
call on the DYYP water stored in the Chino Basin in 2008/09.

21 (*Id.*)

22 **2. Watermaster Should Provide Technical Analysis of the Limitations on**
23 **Future DYYP Expansion of Hydraulic Control Reoperation**

24 The concern has been clearly articulated that storage programs could interfere with
25 hydraulic control.⁶⁴ There appear to be "trade-offs" between maintaining hydraulic control and

26 ⁶⁴ This concern was raised with respect to placing the 50,000 af cap on Local Storage. Future evaluations of the cap
27 were to have included a determination of whether the ". . . accrual of additional Local Storage . . . should be
28 conditioned, curtailed or prohibited if it is necessary to provide priority for the use of storage capacity for those
Storage and Recovery Programs that provide broad mutual benefits to the parties. . ." (Peace Agreement §
5.2(b)(xi))

1 being able to expand storage and recovery programs.⁶⁵ As recently as 2000, the Peace
2 Agreement provided that Watermaster shall be guided by two criteria: (1) the “initial target” for
3 the Storage and Recovery Program is 500,000 af “in addition to the existing storage accounts”;
4 and (2) Watermaster shall “. . . give first priority to Storage and Recovery Programs that provide
5 broad mutual benefits . . .” (Peace Agreement § 5.2(c)(iv)).

6 If expanded Storage and Recovery Programs are not going to be pursued, Watermaster
7 should make that clear. If they are, Watermaster should undertake the necessary technical
8 analysis and modeling to at least provide a rough assessment of whether and to what extent
9 Storage and Recovery Programs can be expanded without interfering with maintenance of
10 Hydraulic Control. If the two conflict, Watermaster should explain how it will address that
11 conflict.

12 **3. Watermaster Should Address Whether Significantly Restricting the**
13 **Prospective Use of Chino Basin Groundwater Storage Space Is Consistent**
14 **with the Judgment, the Peace Agreement, and the OBMP**

14 The Judgment states:

15 11. Available Ground Water Storage Capacity. There exists in Chino Basin a
16 substantial amount of available ground water storage capacity which is not
17 utilized for storage or regulation of Basin Waters. Said reservoir capacity can
18 appropriately be utilized for storage and conjunctive use of supplemental water
19 with Basin Waters. It is essential that said reservoir capacity utilization for
20 storage and conjunctive use of supplemental water be undertaken only under
21 Watermaster control and regulation, in order to protect the integrity of both such
22 Stored Water and Basin Water in storage and the Safe Yield of Chino Basin.

20 12. Utilization of Available Ground Water Capacity. Any person or public
21 entity, whether a party to this action or not, may make reasonable beneficial use
22 of the available ground water storage capacity of Chino Basin for storage of
supplemental water; provided that no such use shall be made except pursuant to
written agreement with Watermaster, as authorized by Paragraph 28. In the

23 ⁶⁵ Dr. Sunding notes the hydraulic control - expanded DYYP “trade-off”:

24 The Peace Agreement provides that there is Target Storage of 500,000 acre-feet *in excess* of then
25 existing storage, whereas this report only considers the Safe Harbor quantity of 500,000 acre-feet
26 of storage in total. In some sense, there is a tradeoff between the decision to pursue max-benefit
and the feasibility of obtaining the higher amount of storage. It should also be noted, however,
that the basin is at the limit of shift capacity for export, and expansion of recharge to achieve
greater storage is costly. Further, the PEIR only considered an additional 250,000 acre-feet of
storage.

27 (Sunding Macro Report p. 5, fn. 5; emphasis added) This footnote suggests that a reason not to expand the DYYP is
28 the cost of increased recharge capacity. (It is not clear what is meant by the statement that “the basin is at the limit
of shift capacity for export . . .”) These statements should be explained.

1 allocation of such storage capacity, the needs and requirements of lands overlying
2 Chino Basin and the owners of rights in the Safe Yield or Operating Safe Yield of
the Basin shall have priority and preference over storage for export.

3 (Judgment ¶¶ 11, 12) The Post-Trial Memorandum reiterated the importance of Chino Basin
4 storage space:

5 Ground Water Storage Contracts. The utilization of excess ground water storage
6 capacity has been recognized in the Judgment. The administration of activities of
7 storing water to utilize that capacity are provided for in underground storage
8 agreements pursuant to Watermaster regulations. This is an enormously
significant aspect of the adjudication, in view of the existence of approximately
2,000,000 acre feet of unused storage capacity within the basin, the largest
resource of its kind in Southern California.

9 (7/11/1978 Post-Trial Memorandum p. 7; emphasis added)

10 The importance of using Basin storage space was reiterated in the 1999 OBMP Phase I
11 Report. A “core value” was:

12 Groundwater Storage. Unused groundwater storage capacity in the Chino Basin
13 is a precious natural resource. The producers will manage the unused storage
14 capacity to maximize the water quality and reliability and minimize the cost of
water supply for all producers. The program will encourage the development of
regional conjunctive use programs.

15 (1999 OBMP Phase I Report p. 3-1; emphasis added) OBMP Goal No. 3, to enhance the
16 management of the Basin, included:

17 Optimize the use of local groundwater storage. Policies and procedures for local
18 storage, cyclic storage and other types of storage accounts will be created to
19 maximize drought protection and improve water quality, and to create an efficient
system to transfer water from producers with surplus water to producers that need
the water.⁶⁶

20 (*Id.* p. 3-3)

21 The OBMP Implementation Plan Program Element 9 calls on Watermaster to “develop
22 and implement” storage and recovery programs. Program Element 9 directs Watermaster to
23 “ensure that Basin water and storage capacity are put to maximum beneficial use while causing
24 no material physical injury.” (OBMP Implementation Plan (Peace Agreement Exhibit “B”) p.
25 37) Watermaster is required to “exercise Best Efforts” to undertake conjunctive use, seasonal

26 _____
27 ⁶⁶ The Technical Report does not appear to address carry-over storage, local storage, or any storage other than
28 DYYP storage in terms of hydraulic control implications. If total water in non-DYYP storage accounts is on the
order of 200,000 af, how would pumping and use of that water affect the technical analysis of hydraulic control,
water levels, safe yield, and future expansion of the DYYP?

1 peaking, and dry year yield programs. (*Id.* p. 44)

2 If Watermaster’s reoperation of the basin for Hydraulic Control results in Watermaster
3 not being able to carry out its Judgment and OBMP obligations, that is a serious problem. This
4 question needs to be fully analyzed and addressed from both the technical and legal perspectives.

5 **E. Can Hydraulic Control Be Achieved and Maintained with Only 400,000 Acre-Feet
6 of New “Controlled Overdraft”?**

7 **1. The Technical Report Does Not Answer this Question**

8 As discussed in Sections IV.A.3 and 4, above, the Technical Report’s Alternatives 1A
9 and 1B with unreplenished desalter production of 400,000 af results in substantially greater
10 overdraft (decrease in groundwater storage) than 400,000 af. This was caused by overestimating
11 New Yield; when New Yield was determined to be substantially lower than anticipated, the
12 resulting “shortfall” in Santa Ana River recharge translated into a “reduction in storage in excess
13 of the 400,000 acre-ft provided for in the Re-operation schedules [Technical Report Tables 7-
14 6(a) and (b) and Resolution Attachment “E”].” (Wildermuth Declaration p. 5, Ins. 11-12)

15 Mr. Wildermuth has also stated generally that:

16 The model analysis has shown that to reliably achieve Hydraulic Control, at least
17 400,000 acre-ft of controlled overdraft will be necessary. Having completed
18 extensive modeling analysis, it is my opinion that this amount is a minimum
19 amount that will be needed. It is possible that in the future we may determine that
additional controlled overdraft is necessary but we will not know for sure until we
initiate the proposed measures.

20 (Wildermuth Declaration #2 p. 9, Ins. 5-9)⁶⁷

21 **2. Watermaster Should Provide Technical Analysis of its Proposed Project with
22 Overdraft (Decrease in Groundwater Storage) Limited to 400,000 Acre-Feet
as a Result of Unreplenished Desalter Production**

23 Watermaster states in its Motion that: “[t]he development of the policy aspects of Basin
24 Re-operation were guided at every step by the highest level of technical analysis . . .” (Motion p.
25 7, Ins. 6-7) Its technical review of its Re-operation Strategy is “[p]erhaps the most important
26

27 ⁶⁷ It is not clear whether Mr. Wildermuth is referring to the “shortfall” caused by having overestimated New Yield,
28 or to other issues. There is no discussion of alternative means of securing hydraulic control other than by further
mining the basin, such as by installing additional desalter wells closer to the river.

1 document that has been submitted to assist the Court . . .” (*Id.* p. 10, ln. 1)

2 It does not appear that Watermaster’s technical work and modeling have actually
3 analyzed the proposed project with overdraft (decreases in groundwater storage) limited to
4 400,000 af as a result of unreplenished desalter production. Watermaster’s Peace II Measure to
5 amend Judgment Exhibit “I”, the “central document for which Watermaster seeks court approval,
6 limits additional controlled overdraft to 400,000 af. The technical analysis does not discuss the
7 decreases in groundwater storage that will result from 400,000 af of unreplenished desalter
8 pumping, however.

9 **F. Will a “New Equilibrium” Be Achieved at the End of the Basin Reoperation Period**
10 **(2030)?**

11 **1. Watermaster’s Motion**

12 The concept that a “new equilibrium” will be realized at the end of the reoperation period
13 (2030) is not addressed in Watermaster’s Motion. Watermaster notes only that “. . . at the end of
14 the period of Basin Re-operation, a replenishment obligation relative to the desalters will need to
15 be satisfied.”⁶⁸ (Motion p. 15, lns. 17-18)

16 **2. The Technical Report Does Not Answer This Question**

17 Each planning alternative was evaluated for six parameters:

18 Each planning alternative was evaluated to determine changes in groundwater
19 level, changes in Santa Ana River discharges, changes in basin balance, hydraulic
control effectiveness, changes in safe yield, and potential subsidence.

20 (Final Technical Report p. 7-12) The projected achievement of a “new equilibrium” was not an
21 evaluation parameter. In fact, “new equilibrium” does not appear to be discussed in the
22 Technical Report.

23 Constraints placed on the scope of the technical work may simply have made any
24 assessment of a “new equilibrium” impossible. Mr. Wildermuth explains that it was outside the
25 scope of his investigation to “optimize groundwater production and replenishment projections”
26 (Wildermuth Declaration #2 p. 3, lns. 24-25), or to “. . . take into account pro-active measures

27
28 ⁶⁸ It is clear from Resolution Attachment “E” that replenishment of desalter pumping is required well before 2030.

1 that might be prudently undertaken to expand recharge capability . . .” (*id.* p. 8, lns 23-24).

2 Presumably, one key to achieving a “new equilibrium” is to have sufficient recharge capacity
3 and replenishment supplies available.

4 In addition, assumptions and constraints used in the technical and modeling analyses are
5 unlikely to persist after 2030 (or even that long). Groundwater production is unlikely to be
6 “capped” beginning in 2024/25 at 205,166 afa. (*See* Technical Report Table 7-8) Controlled
7 overdraft of 400,000 af is described as a “minimum amount” needed for Hydraulic Control. If
8 more than 400,000 af is overdrafted, there will be an accrued replenishment obligation to be met
9 after 2030 to “mitigate” for a “shortfall” in assumed New Yield. (Technical Report p. 7-13)
10 Additional recharge and increases in basin storage (Local Storage, DYYP, and other conjunctive
11 use programs) also presumably factor into whether a “new equilibrium” can and will be realized.

12 **3. Analysis of a “New Equilibrium” Is Deferred to Future Updates of the**
13 **Recharge Master Plan**

14 Only the Peace II Agreement mentions a “new equilibrium”. In discussing updating the
15 Recharge Master Plan, the agreement states:

16 Watermaster will update and obtain Court approval of its update to the Recharge
17 Master Plan to address how the Basin will be contemporaneously managed to
18 secure and maintain Hydraulic Control and subsequently operated at a new
equilibrium at the conclusion of the period of Re-Operation.

19 (Peace Agreement § 8.1)

20 **4. Whether and How a “New Equilibrium” Can and Will Be Achieved at the**
21 **End of the Basin Reoperation Period Should Be Addressed Before Basin**
22 **Reoperation Is Approved**

23 “New equilibrium” is completely undefined. There is no definition or description of
24 basin management after the “period of re-operation” concludes – if it does – in 2030. One of the
25 most important questions for Watermaster and the parties to address is whether “controlled
26 overdraft” of the basin will stop after an additional 400,000 af is mined. If the 400,000 is a
27 “minimum”, presumably Watermaster and the parties will return to the court and seek approval
for additional mining.

28 However, given the very qualitative descriptors used to assess the state of hydraulic

1 control, e.g., “weak” and “robust”, it is unclear how Watermaster will monitor and assess actual
2 conditions, and then determine whether some qualitative target has been achieved, or whether yet
3 more “controlled overdraft” will be “required” to achieve such a nonspecific condition. How
4 will the court be able to assess a future request for more mining without having a clear definition
5 of the “new equilibrium” that was to have been reached by 2030? A technical and legal
6 evaluation of the “new equilibrium” issue should be made available to the court before the court
7 issues its ruling.

8 **G. What Recharge Assurances Would Be Adequate?**

9 **1. Watermaster’s Motion**

10 Watermaster’s Motion states that the proposed amendment to Judgment Exhibit “I” and
11 the Peace II Agreement contain commitments to ensure that “sufficient recharge capacity exists
12 in the future . . .”⁶⁹ (Motion p. 5, Ins. 24-25) The Motion does not reflect any Watermaster
13 commitment to actually develop additional recharge capacity in the future; the “commitment” is
14 to update and implement the recharge master plan, which may or may not call for increases in
15 recharge capacity. The Motion references Articles VII and VIII of the Peace II Agreement,
16 noting that they describe:

17 . . . the measures that Watermaster will take to continue to develop the recharge
18 capacity of the Basin in preparation for the time when the controlled overdraft
period is complete.

19 (*Id.* p. 11, Ins. 22-25)

20 No “measures” are described. Watermaster implies that no additional recharge facilities
21 may be needed until the end of the “Re-operation period”, even though the Exhibit “E” tables
22 indicate otherwise:

23 The parties recognize that at the end of the period of Basin Re-operation, a
24 replenishment obligation relative to the desalters will need to be satisfied. During
25 the period of Re-operation demands on the Basin will continue to grow, and at the
26 end of the Re-operation period Watermaster’s recharge capabilities may not be
27 sufficient to meet to the desalter replenishment obligation unless this recharge
capacity continues to develop throughout the Re-operation period. The proposed
Judgment amendment regarding Re-operation describes measures that will be
taken in order to continually update and implement a Recharge Master Plan in

28 ⁶⁹ See discussion of Judgment Exhibit “I” assurances, above, at Section IV.A.7.

1 order to ensure that sufficient recharge capacity exists in the future, and these
2 commitments are further mirrored in the Peace II Agreement Article VIII.

3 (*Id.* p. 15, Ins. 17-26; emphasis added) (The Technical Report is clear that recharge capabilities
4 are not sufficient; to say they “may not be sufficient” is troublesome.) The only mention of
5 specific quantities of recharge is in regard to the agreement to physically recharge at least 6500
6 AFA in MZ-1 as part of Watermaster’s replenishment water program, as set forth in the Peace II
7 Agreement Article VIII. (*Id.* p. 19, Ins. 12-23)

8 The Motion does not discuss actual future additional recharge by Watermaster, the
9 “commitments” which are “mirrored” in Peace II Agreement Article VIII, the “continuing
10 covenant”, or any other provisions in the Peace II Agreement. There is no useful discussion of
11 either the “contingency plan” or future recharge master plans, or of any mechanism through
12 which the court might enforce Watermaster’s “commitment”.

13 **2. Watermaster’s Technical Report Does Not Analyze Future Recharge and**
14 **Replenishment Issues**

15 The Technical Report’s discussion of the current constraints on recharge capacity is not
16 encouraging. The Technical Report states that:

17 For this investigation, the supplemental water recharge capacity in the basin was
18 estimated currently (2007) to be about 61,000 acre-ft/yr, which will reach about
19 91,000 acre-ft/yr when planned improvements are completed in mid-2008. The
future replenishment obligation exceeds the supplemental water recharge capacity
available to Watermaster by variable amounts that increase over time.

20 (Technical Report p. 7-7) There is no discussion of the “improvements” to be completed by
21 mid-2008. The Technical Report stretches the 91,000 afa to 104,000 afa:

22 In fact, the required replenishment capacity exceeds the assumed maximum
23 capacity of about 91,000 acre-ft/yr after 2026/27. The replenishment capacity
24 was increased to about 104,000 acre-ft/yr by reducing the duration of the annual
25 maintenance period from three to two months. Presumably, this can be
accomplished without any new facilities. This adjustment in replenishment
capacity was included in [the] final Baseline Alternative and Alternatives 1A and
1B.

26 (*Id.* p. 7-11) There is no support for the assumptions that annual maintenance periods can be
27 shortened or that 104,000 acre-feet per year of replenishment can be accomplished without any
28 new facilities. The Technical Report makes it clear that there are no plans to expand

1 replenishment capacity “. . . beyond the recharge improvements that are expected to be
2 completed in 2008.” (*Id.* p. 7-10)

3 The scope of the technical work was restricted. Mr. Wildermuth stated that:

4 It was outside the scope of my investigation to optimize the groundwater patterns
5 and associated replenishment.

6 . . . The model does not take into account pro-active measures that might be
7 prudently undertaken by Watermaster to expand recharge capability through
8 recharge improvements, including aquifer storage and recovery projects.

8 (Wildermuth Declaration #2 p. 3, lns. 24-25; p. 8, lns. 23-25) As a consequence of the
9 limitations on Mr. Wildermuth’s analysis, presumably at Watermaster’s direction,⁷⁰ no current
10 technical analysis or modeling is available to help the parties, the Watermaster, or the court
11 evaluate the potential to develop new recharge capacity or the effect that future increased
12 recharge would have on maintaining either hydraulic control or safe yield.

13 **3. Peace II Agreement Assurances Regarding Recharge Restrict Watermaster**
14 **Discretion**

15 Certain problems with the Peace II Agreement recharge assurances are discussed, above,
16 in Section IV.A.7. The comments on the need to revise proposed Exhibit “I” Paragraph 2(b)(6)
17 also apply to Peace II Agreement Paragraph 7.3.

18 There are at least two additional problems with Peace II Agreement Article VIII. The
19 first is that, although Watermaster is charged with updating its Recharge Master Plan and
20 obtaining court approval of plan updates,

21 The Recharge Master Plan will be jointly approved by IEUA and Watermaster. . .
22 With the concurrence of IEUA and Watermaster, the Recharge Master Plan will
23 be updated and amended as frequently as necessary with Court approval. . .

23 (Peace II Agreement Art. VIII, ¶ 8.1) In addition, “. . . capital improvements for recharge basins
24 that do or can receive recycled water . . . must be mutually approved”. (*Id.* ¶ 8.1(b))

25 Presumably, it is IEUA’s approval that is required. These provisions would hamstring
26 Watermaster’s recharge master planning and implementation if IEUA does not give its approval.

27
28 ⁷⁰ Mr. Manning directed the technical work and presumably dictated its scope. (Manning Declaration ¶¶ 3, 4, 5)

1 It is Watermaster’s responsibility to administer the Judgment’s physical solution, which
2 requires the ability and discretion to provide for recharge capacity and replenishment.
3 Watermaster is the “steward of the Basin” and “arm of the Court charged with administering the
4 terms of the 1978 Judgment.”⁷¹ The need for IEUA’s approval should not stand in the way of
5 Watermaster exercising its full powers and discretion.

6 The second further problem with Article VIII stems from the provisions of the Section
7 8.3 “Continuing Covenant”. Just as with Section 7.3 and proposed Judgment Exhibit “I”
8 Paragraph 2(b)(6), there is no guidance as to what is meant by “substantial compliance”.
9 However, Section 8.3 does answer the question of who will determine whether there is
10 “substantial compliance”. Section 8.3 provides that:

11 . . . the annual availability of any portion of the 400,000 acre-feet set aside as
12 controlled overdraft as a component of the Physical Solution is expressly subject
13 to Watermaster making an annual finding about whether it is in substantial
compliance with the revised Watermaster Recharge Master Plan pursuant to
Paragraphs 7.3 and 8.1 above.

14 (Peace II Agreement Art. VIII, § 8.3; emphasis added)

15 The “Long-term risks attributable to un-replenished groundwater production by the
16 Desalters” which Section 8.3 purports to address are of great concern.⁷² Watermaster’s
17 “continuing covenant” does not provide satisfactory assurances that the long-term risks will be
18 avoided, although the court on its own motion can inquire into all Watermaster actions, including
19 its “annual finding” of “substantial compliance”, and review *de novo* the question at issue.

20 (Judgment ¶ 31)

21 **4. The Peace II Agreement Recharge Assurances Do Not Expand Existing**
22 **Watermaster Recharge Obligations**

23 Watermaster is charged with carrying out the Judgment’s Physical Solution, including
24 obtaining “supplemental water replenishment of Basin Water” from “any available source”.

25 (Judgment ¶¶ 41, 49) In the Peace Agreement, “. . . the Parties expressly consent to
26 Watermaster’s performance . . .” of certain actions, including approving all supplemental water

27 ⁷¹ *Id.* p. 2, ¶ 6.

28 ⁷² *See* discussion, above, at Section VI.F.

1 recharge to the Chino Basin. (Peace Agreement ¶ 5.1(a) [p. 20]) More specifically, Watermaster
2 is charged to “exercise its Best Efforts” to:

- 3 (i) protect and enhance the Safe Yield of the Chino Basin through
4 Replenishment and Recharge;
- 5 (ii) ensure there is sufficient Recharge capacity for Recharge Water to meet
6 the goals of the OBMP and the future water supply needs within the Chino
7 Basin . . .
- 8 (ix) coordinate, facilitate and arrange for the construction of the works and
9 facilities necessary to implement the quantities of Recharge identified in
10 the OBMP Implementation Plan.

11 (*Id.* ¶5.1(e) [pp. 20-21])

12 The OBMP Implementation Plan Program Element 2 includes the development and
13 implementation of a “comprehensive recharge program”, and the need for such a program is
14 described in detail in the OBMP Phase 1 Report. The Implementation Plan discusses the benefits
15 of increasing stormwater recharge, the projected growth of annual replenishment obligations,
16 assumptions regarding the availability of replenishment water,⁷³ and the availability and need for
17 future replenishment. Because Watermaster cannot own recharge projects, but must arrange
18 through contracts for the construction and operation of recharge facilities, the OBMP
19 Implementation Plan provided for the preparation of recharge master plans.

20 The recharge master plan (Phase 2) was directed to produce a priority list of recharge
21 projects and provided that Watermaster would coordinate with the appropriate public agencies to
22 identify new supplemental water projects. Although surplus recharge capacity was stated to be
23 available, the plan warned:

24 The surplus recharge capacity could be used up quickly by future replenishment
25 needs and implementation of storage and recovery programs. The availability of
26 in-lieu recharge capacity for in-lieu replenishment . . . is not a certainty. In the
27 present mode of basin management, in-lieu recharge capacity is available on an ad
28 hoc basis and requires the cooperation of water supply agencies that have access
29 to supplemental water. If a substantial storage and recovery program is
30 implemented, a major component of it may be satisfaction of replenishment
31 obligations by in-lieu recharge.

32 (OBMP Implementation Plan p. 13)

33 _____
34 ⁷³ The OBMP Implementation Plan assumes replenishment water would be available seven out of ten years.
35 (OBMP Implementation Plan p. 13)

1 The parties to the Peace Agreement have approved Watermaster proceeding as
2 provided. . . Implementation measures that follow preparation of a Recharge
3 Master Plan will be predicated on the implementation actions and schedules that
4 are produced in the Master Plan and the Peace Agreement. However, a strong
5 financial motivation is created for the prompt funding of local recharge projects as
6 soon as possible because the members of the Appropriative Pool under the
7 Judgment will incur replenishment obligations if the safe yield of the Basin is not
8 enhanced by a sufficient quantity to cover the Chino I expansion, and the Chino II
9 Desalters as well as the individual over-production obligations.

6 (*Id.* p. 22)

7 Watermaster's existing obligations under the Judgment, Peace Agreement, and OBMP
8 are more clear-cut than the assurances included in Watermaster's proposed amendment to
9 Judgment Exhibit "I" and Peace II Agreement Articles VII and VIII. It is not clear that
10 Watermaster is adding to existing commitments.

11 **5. Recharge Assurances Are Critical, Given the Substantial Increase in**
12 **"Controlled Overdraft"**

13 "Forgiveness" of replenishment assessments for 400,000 acre-feet of desalter production
14 takes the pressure off of investing in additional recharge capacity. Just as the original 200,000 af
15 of Operating Safe Yield was allowed to "reduce the burden of assessment", the "forgiveness"
16 associated with controlled overdraft very substantially eases the burdens of reaching 40,000 acre-
17 feet of desalter pumping.⁷⁴

18 The justification for the original 200,000 acre-feet of mining is said to have been
19 "because of the relative uncertainty of the precise extent of safe yield", and because the basin has
20 "approximately eight million acre feet of water in usable storage". Provision was made for
21 "offsetting the limited mining by requiring the Appropriative Pool to take the burden of
22 reductions in the Safe Yield if such reduction should occur in the future. It was said the

23 _____
24 ⁷⁴ (*See* Plaintiff's Post-Trial Memorandum (7/11/1978) p. 6, ¶ 2) The Sunding analyses support the notion that
25 "forgiveness" of replenishment assessments as part of basin reoperation provides a reasonable distribution of
26 benefits to parties to the Judgment. This is apparently not the case for increasing recharge capacity:

26 Among individual agencies in the Basin, the benefit of an increase in recharge capacity is
27 distributed exclusively to agencies on the extensive margin of water supply. . .

27 . . . policies which lead [to] an increase in Basin safe yield are not only more valuable to agencies
28 in the Basin than an increase in recharge capacity, but the benefits are also distributed more
29 equally.

28 (*Sunding Report #2* pp. 5-6)

1 maximum amount of extraction (200,000 acre-feet) “would result in ground water changes in the
2 Basin of from zero to 16 feet, which is well within acceptable limits”. (Plaintiff’s Pretrial
3 Memorandum p. 12, Ins. 4-22; Plaintiff’s Post-Trial Memorandum p. 6, Ins. 25-28; p. 7, Ins. 1-8)

4 There are important distinctions to be drawn between the Judgment’s allowance of
5 200,000 acre-feet of “controlled overdraft” as part of “operating safe yield” and the additional
6 400,000 afa of controlled overdraft Watermaster is now asking for. The 200,000 af was limited
7 to a maximum of 10,000 afa . (Judgment Exhibit “I” ¶ 2(c)) Watermaster has limited the
8 quantity allowed to 5,000 afa, and the 200,000 acre-feet will have been exhausted by 2017. With
9 projected desalter pumping of nearly 40,000 afa to continue indefinitely, unreplenished desalter
10 pumping will be five times the current 5,000 afa, or more.⁷⁵

11 Further, when the 200,000 acre-feet was allowed in 1978, the safe yield calculation was
12 not based on extensive data; safe yield has actually been larger than 140,000 for decades,⁷⁶ and
13 only now is again at about 140,000. A steady significant decline is now forecast. There are
14 vastly more data to support the Technical Report’s declining safe yield projections than were
15 available in 1978 when safe yield was first estimated. A strong recharge program is essential to
16 offset the declining safe yield and the substantially increased annual overdraft of the basin.

17 **H. Are There Alternatives to Basin Reoperation for Hydraulic Control Which Would**
18 **Allow the Use and Recharge of Recycled Water Which Will Be Included in CEQA**
Analysis?

19 **1. CEQA Analysis Will Be Limited**

20 As discussed in Section V.B, above, Watermaster anticipates that only desalter expansion
21 will be subject to CEQA review. IEUA is the acknowledged Lead Agency for CEQA review.
22 (Peace II Agreement Article II)

23 **2. Watermaster Should Provide Full Analysis of Potential Adverse Effects of**
24 **Basin Reoperation for Hydraulic Control if the IEUA CEQA Review Is**
Limited to Desalter Expansion

25 Watermaster’s Technical Report and Mr. Wildermuth’s Declarations express conclusions
26

27 ⁷⁵ See Technical Report pp. 7-9, 7-13, and Tables 7-6(a) and 7-6(b).

28 ⁷⁶ See Technical Report Figure 7-13. Safe Yield can now be recalculated every year. Since Safe Yield is projected to significantly decline, annual recalculation or a reconciliation mechanism is essential.

1 that neither basin reoperation itself nor any of the consequences of basin reoperation will cause
2 “Material Physical Injury”, the contractual standard set by the Peace Agreement. As noted
3 several times, however, Watermaster’s actions must be consistent with the Judgment and its
4 Physical Solution, must be in the public interest, and must carry out the mandate of California
5 Constitution Article X, Section 2.

6 Analysis of whether the proposed Basin reoperation satisfies those more stringent tests
7 will likely be the only comprehensive analysis that is made of Watermaster’s proposed program.
8 Because CEQA review will almost certainly be quite limited, unless Watermaster’s technical
9 analysis is complete and “robust”, there will be no adequate analysis of the consequences and
10 implications of Watermaster’s proposed Basin reoperation strategy, and no comprehensive
11 evaluation of potential mitigation actions that should be identified and undertaken.

12 **3. Full Analysis Should Include Alternatives to Hydraulic Control for Recycled**
13 **Water Recharge**

14 Watermaster’s Motion states that it is of “paramount importance” to reoperate the basin
15 to allow for increased use of recycled water. (Motion p. 16, lns. 15-16) Watermaster and the
16 parties have apparently determined that “optimizing” the use and recharge of recycled water is of
17 highest priority and value to the basin, and commitments have already been made to achieve
18 hydraulic control. (*Id.* p. 5, lns. 6-12)

19 The only mention found in the Peace II documents of any alternative to hydraulic control
20 for recycled water use was by Dr. Sunding. As an alternative to hydraulic control reoperation:
21 “. . . recycled water would have to be desalted prior to recharge. Costs are not available at this
22 time for this option.” (Sunding Macro Analysis p. 3, ln. 2) If there are practical alternatives for
23 recycled water use that do not result in basin overdraft and do not change the entire gradient of
24 the basin, and possibly maintain safe yield and allow additional storage and recovery programs,
25 those alternative should be identified and evaluated. The economics of recycled water use and
26 recharge arguably should not be of paramount importance to Watermaster, given the
27 Watermaster’s overall basin management obligations under the Judgment.

28 ///

1 **I. Is Basin Reoperation for Hydraulic Control Protective of the Basin Consistent with**
2 **California Constitution Article X, Section 2?**

3 Watermaster's Technical Report has raised important questions with regard to issues
4 Watermaster must address. The fact that safe yield has just been determined to be declining
5 significantly should by itself give Watermaster reason to reconsider its management priorities
6 and objectives. Watermaster should provide the court with a complete assessment of all basin
7 issues and options and at least identify and discuss the potential "trade-offs" that are involved in
8 pursuing one basin operation strategy versus another.

9 Watermaster was to file the 2006 State of the Basin Report by July 31, 2007. That report
10 was to include "a reconciliation of pumping and safe yield for each and every year since 1978
11 and for the combined period of years from 1978 to current." The reconciliation was to "provide
12 the court with a clear and complete basis for consideration of any re-operation proposals for
13 Chino Basin in connection with the Peace II Agreement process..." Further, the reconciliation
14 was to "clearly explain whether, and the extent to which, *safe yield* is being maintained and
15 overproduction is being replenished by Watermaster." (Order Concerning OBMP Status Report
16 2006-02, Future Desalting Plans, and MZ-1 Long-Term Plan, dated May 23, 2007, p. 3, ¶ 3.)
17 Watermaster has yet to provide the Court with the accounting reconciliation ordered six months
18 ago. It would behoove Watermaster to present this reconciliation to the Court at the hearing on
19 November 29, 2007.

20 The parties proclaim that they and Watermaster have unanimously decided to proceed
21 with the Basin reoperation strategy. They should put this decision into context for the court so
22 the court fully understands the potential "trade-offs" and the consequences of Basin reoperation.
23 The court requires that the decisions that have been made, and the consequences of Watermaster
24 proceeding as proposed, are put into context – both historical and prospectively. The 2006 State
25 of the Basin Report should put the Basin reoperation strategy in perspective. The State of the
26 Basin Report "is intended to be an engineering report on the physical state of the basin, in which
27 basin conditions are compared with a pre-OBMP baseline in order to measure changes in basin
28 condition, the effectiveness of the OBMP, and the effects of any reoperation of the basin."

1 (Order Re: Receiving OBMP Status Reports and Annual Reports and Further Action, dated
2 February 16, 2007, p. 3, lns. 11-14.)

3 **VII. RECOMMENDATIONS**

4 As noted in the Introduction, testimony at the November 29, 2007, hearing will, we hope,
5 address many of the questions raised herein. A preliminary recommendation is that Watermaster
6 conduct further technical analysis and modeling on a range of issues. Watermaster should
7 respond with either argument that additional analysis is not necessary, or provide the court with
8 the recommended technical analysis or a commitment to a schedule for completing the work and
9 submitting the further analysis to the court.

10 Questions have also been raised as to certain legal issues. Final recommendations cannot
11 be developed without the benefit of Watermaster's detailed, point-by-point responses to the
12 questions raised. Watermaster could submit a Memorandum of Points and Authorities in support
13 of its Motion, a specific response to these Preliminary Comments and Recommendations, or
14 both.

15 Watermaster and the parties acknowledge the great importance of the court's decision in
16 this matter. Watermaster cautioned:

17 The Basin Re-operation strategy is a very large project with significant
18 consequences that will have impacts for future generations. The initiation of a
19 project of this magnitude necessitates a high degree of caution.

20 (Motion p. 12, lns. 8-10; emphasis added)

21 Watermaster's Motion makes it clear that the parties are very protective of areas that they
22 believe are within their contractual rights to pursue, and that they can change or amplify
23 agreements without court approval. It is the case that parties can contractually proceed in
24 various ways which do not raise the issue of whether Watermaster would be acting in a manner
25 that is consistent with the Judgment. However, there are certain areas, as Watermaster's Motion
26 acknowledges, which the court must continue to oversee with vigor.

27 Watermaster now seeks court approval pursuant to Judgment Paragraphs 15 and 31. The
28 court must inquire and satisfy itself that Watermaster's proposed reoperation is consistent with
the Judgment, consistent with the Judgment's physical solution, and consistent with the

1 fundamental premise that the groundwater basin must be protected in the public interest and
2 consistent with California Constitution Article X, Section 2. The court should direct
3 Watermaster to address the questions raised herein, including technical and legal analyses, before
4 the court rules on Watermaster's Motion.

5 Dated: November 27, 2007

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Anne J. Schneider, Special Referee

ATTACHMENT 1

SUMMARY OF MODEL-RELATED ANALYSES PERTINENT TO
INTERPRETATION OF FINAL CBWM TECHNICAL REPORT

Summary of Model-Related Analyses Pertinent to Interpretation of Final CBWM Technical Report

TO: Anne J. Schneider
Ellison, Schneider & Harris

FROM: Joseph C. Scalmanini

DATE: November 26, 2007

PROJECT NUMBER: 05-6-111

In response to your request, following is a brief summary of model-related analyses that have been conducted by Chino Basin Watermaster, prior to the recently completed Watermaster 2007 Model, and are pertinent to interpretation of the **2007 CBWM Groundwater Model Documentation and Evaluation of the Peace II Project Description Final Report** prepared by Wildermuth Environmental Inc. (WEI), November 2007. In large part, the following is based on review of two earlier WEI reports, both of which report the results of planning-level simulations, utilizing the earlier Updated Watermaster 2003 Model, of hydraulic control alternatives. Those two reports, the draft **Analysis of Future Replenishment and Desalter Plans Pursuant to the Peace Agreement and Peace II Process**, April 2006, and **Addendum to the Draft April 2006 Report Analysis of Future Replenishment and Desalter Plans Pursuant to the Peace Agreement and Peace II Process**, December 2006, are both referenced in WEI's 2007 Final Report and are available on Watermaster's website http://www.cbwm.org/rep_engineering.htm.

Watermaster's original analyses of future hydraulic control alternatives were documented in a draft report **Analysis of Future Replenishment and Desalter Plans Pursuant to the Peace Agreement and the Peace II Process** by Wildermuth Environmental Inc. (WEI) in April, 2006. The results of 13 scenarios were described and tabulated in that report after simulation of those scenarios with Watermaster's Updated 2003 Numerical Groundwater Flow Model. One scenario was run to examine the effect of not proceeding with desalters and the associated replacement pumping in the southern part of the Basin, and the other 12 scenarios involved some degree of either continuing pumping associated with Desalters I and II, or expanding those desalters and/or constructing an additional Desalter III. In order to examine the potential formation of hydraulic control, the 12 desalter scenarios were divided into four groups, each of which was simulated with different amounts of replenishment for the desalter pumping; each of the four groups included scenarios where all, half, or none of the desalter pumping was replenished. The focus of those analyses was to examine whether, at half replenishment of all

desalter pumping through the term of the Peace Agreement, hydraulic control would form, and to estimate resultant changes in groundwater storage and safe yield of the Basin.

None of the half-replenishment alternatives examined in the April 2006 WEI report showed complete formation of hydraulic control. As a result, subsequent analyses were conducted with Watermaster's Updated 2003 Model to examine two similar scenarios known as the West Desalter or Chino Creek alternative, which also focused on whether hydraulic control would form at half replenishment of all desalter pumping through the term of the Peace Agreement, and which also estimated resultant changes in groundwater storage and safe yield of the Basin. The results of the West Desalter/Chino Creek analyses were reported in **Addendum to the Draft April 2006 Report Analysis of Future Replenishment and Desalter Plans Pursuant to the Peace Agreement and the Peace II Process** by WEI in December, 2006. That report utilized a format similar to that of WEI's April 2006 report and included a summary Table 3-3 that carried forward the results of the 13 scenarios in the April 2006 report and added the results of the West Desalter/Chino Creek scenarios at half replenishment. A copy of that Table 3-3 is attached for reference.

Of interest in WEI's Table 3-3 with regard to the Watermaster's current proposal are several items. First, it is notable that, prior to analysis of Watermaster's current proposal with the recently completed 2007 Model, there was no analysis of any scenario that involved controlled overdraft of just 400,000 acre-feet (where "controlled overdraft" here means not replenishing a certain amount of desalter pumping). All the focus on reduced replenishment in the April and December 2006 WEI reports was on half-replenishment of desalter pumping. In the April 2006 analyses, half replenishment in the four analyzed alternatives ranged from 462,000 to 615,000 af. The resultant changes in groundwater storage (overdraft) as a result of half replenishment ranged between 334,000 and 376,000 af, which are in the general range of about 60 to 75 percent of the amount of water not replenished. (Presumably, the difference between groundwater storage decline and non-replenishment was the result of "new yield" contributing to recharge of the Basin.) Ultimately, however, the various alternatives analyzed in April 2006 did not fully achieve hydraulic control, so subsequent analyses were undertaken to modify the distribution of desalter pumping to achieve hydraulic control, i.e. analyze the addition of a West Desalter/Chino Creek well field to the Desalter I and II well fields.

A second notable result in Table 3-3 is that, at half replenishment, a combination of Desalters I and II with a new Chino Creek Desalter Well Field was projected to result in a decrease in groundwater storage of about 340,000 af. Total pumping and half replenishment (full replenishment and no replenishment were not reported in December 2006) were comparable to two of the previously analyzed (April 2006) alternatives, so it would appear that the amount of unreplenished production was about 490,000 af. It is difficult to exactly reconcile the numbers but the ultimate conclusion and recommendation from WEI in its December 2006 report were

that Watermaster incorporate provisions in the Peace II term sheet to “reduce the **storage** in the Basin to ensure hydraulic control ... the anticipated reduction in **storage** will be between 350,000 to 400,000 acre-ft” (emphasis added). That range is now in notable contrast to the proposed reoperation strategy that would reduce groundwater storage by more than 600,000 af.

A third notable result in Table 3-3 is that, with the exception of the No-Desalter alternative (which resulted in a decrease in safe yield, to about 135,000 afy), all desalter alternatives resulted in projected increases in the safe yield of the Basin. For all the half-replenishment scenarios, the safe yield was projected to increase into the general range of about 160,000 to 164,000 afy; for the West Desalter/Chino Creek scenarios, which were interpreted to achieve hydraulic control, the safe yield was projected to increase to about 161,000 afy. All the latter safe yield values are now in notable contrast to the proposed reoperation strategy that would result in a continuously declining safe yield, to about 127,000 afy, by the end of the Peace Agreement term (2030).

It is unclear how the current proposal to not replenish 400,000 af of desalter pumping was technically derived. The 2007 Model was not completed (calibrated and ready for analysis of basin operational alternatives) until late October 2007, and has only been used to simulate the effects of reoperation as now proposed. The 2007 Model has not been used to analyze anything other than what is currently proposed, and was not available to be used to “guide” the development of the ultimate proposed reoperation strategy. All previously simulated alternatives that achieved hydraulic control included “half” replenishment, which equated to not replenishing about 490,000 af of total desalter pumping. All previously simulated alternatives resulted in projected changes in groundwater storage that were less than about 375,000 af; the only two alternatives that achieved hydraulic control had projected decreases in groundwater storage of about 340,000 af. Ultimately, as noted above, WEI recommended that Basin storage be reduced to ensure hydraulic control, and noted that the anticipated reduction in storage would be between 350,000 and 400,000 af. It is unclear how those alternatives were reconfigured into the current proposal that would replenish **more** of the desalter pumping (not replenishing 400,000 af instead of 490,000 af), still achieve hydraulic control, but result in nearly twice as much depletion of groundwater storage (626,000 to 676,000 af instead of 340,000 af). It is illogical that **increasing** the replenishment of desalter pumping would result in lower groundwater levels and **decreased** groundwater storage. No explanation of these changes has been provided, but is needed to understand the significant changes in Basin response from the last technical analysis during formulation of the Basin reoperation strategy to the recent technical analysis (with the 2007 Model) of the proposed reoperation strategy.

Attachment: Table 3-3 from WEI, December 2006.

**Table 3-3
Summary of Yield and Storage Change Projections for Each Alternative¹**

Desalter Plan	Desalter Replenishment Plan	Safe Yield Based on Last Ten Years of Simulation, 2021 through 2030					Safe Yield for the Remaining Period of the Peace Agreement, 2006 through 2030				
		Pumping	Change in Storage	Replenishment	Safe Yield	Δ Safe Yield ²	Pumping	Change in Storage ³	Replenishment	Safe Yield	Δ Safe Yield ²
		(acre-ft)	(acre-ft)	(acre-ft)	(acre-ft/yr)	(acre-ft/yr)	(acre-ft)	(acre-ft)	(acre-ft)	(acre-ft/yr)	(acre-ft/yr)
Desalters I & II at 29.2 mgd	Full	2,610,000	17,000	1,071,000	155,600	3,600	6,279,000	33,000	2,392,000	156,800	4,800
	Half	2,610,000	-114,000	883,000	161,300	9,300	6,279,000	-355,000	1,930,000	159,760	7,760
	None	2,610,000	-270,000	694,000	164,600	12,600	6,279,000	-771,000	1,468,000	161,600	9,600
Desalters I, II at 29.2 mgd and Expanded II at 3.9 mgd	Full	2,653,000	53,000	1,122,000	158,400	6,400	6,359,000	90,000	2,485,000	158,560	6,560
	Half	2,653,000	-111,000	908,000	163,400	11,400	6,359,000	-358,000	1,977,000	160,960	8,960
	None	2,653,000	-286,000	694,000	167,300	15,300	6,359,000	-809,000	1,468,000	163,280	11,280
Desalters I, II at 29.2 mgd and Desalter III at 3.9 mgd	Full	2,653,000	61,000	1,122,000	159,200	7,200	6,359,000	106,000	2,485,000	159,200	7,200
	Half	2,653,000	-100,000	908,000	164,500	12,500	6,359,000	-334,000	1,977,000	161,920	9,920
	None	2,653,000	-277,000	694,000	168,200	16,200	6,359,000	-793,000	1,468,000	163,920	11,920
Desalters I, II at 29.2 mgd and Desalter III at 10.8 mgd	Full	2,622,000	78,000	1,088,000	161,200	9,200	6,298,000	165,000	2,431,000	161,280	9,280
	Half	2,622,000	-117,000	833,000	167,200	15,200	6,298,000	-376,000	1,816,000	164,240	12,240
	None	2,622,000	-335,000	578,000	170,900	18,900	6,298,000	-943,000	1,202,000	166,120	14,120
Desalters I and II at ___ mgd, Chino Creek Well Field A	Half	2,639,529	-103,110	907,504	162,891	10,891	6,343,668	-343,101	1,974,217	161,054	9,054
Desalters I and II at ___ mgd, Chino Creek Well Field B	Half	2,643,821	-101,584	907,504	163,473	11,473	6,353,258	-339,794	1,974,217	161,570	9,570
No Desalters	NA	2,220,000	-196,000	694,000	133,000	-19,000	5,343,000	-504,000	1,468,000	134,840	-17,160

Notes

1 – See Exhibit B-2 for modeling results summarized on this page.

2 – Change in safe yield equals computed yield minus 152,000 acre-ft/yr (safe yield from Judgment plus assumed new storm water recharge of 12,000 acre-ft/yr)

3 – Change in storage includes 60,000 acre-ft of controlled overdraft pursuant to Judgment and is not related to either desalting or replenishment plans.

4 – The operation of the expansion of the desalter expansion is deferred until 2011 in this plan which is slightly later than the other desalter plans described in the April 2006 Report and results in slightly less yield for prior to 2021

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 27, 2007 I served the following:

- 1) **SPECIAL REFEREE'S PRELIMINARY COMMENTS AND RECOMMENDATIONS ON MOTION FOR APPROVAL OF PEACE II DOCUMENTS**

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 27, 2007 in Rancho Cucamonga, California.



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