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7
8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF SAN BERNARDINO**

10 CHINO BASIN MUNICIPAL WATER
11 DISTRICT

12 Plaintiff,

13 vs.

14 CITY OF CHINO, ET AL.

15 Defendant.
16
17

Case No. RCV 51010

[Assigned for All Purposes to the
Honorable MICHAEL GUNN]

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

18 **I. Introduction**

19 On August 27, 2007, the Court held a hearing with regard to procedural issues regarding
20 Watermaster's Long Term Plan for the management of subsidence. At that hearing the issue of the
21 Peace II measures was discussed and Watermaster notified the Court of potential adverse
22 consequences if approval of the Peace II measures was not obtained by the end of the year. The
23 Court instructed Watermaster: "What you guys need to do is what you've done so well in the past,
24 and that is by consensus building, resolve some of these problems." (August 27, 2007 Reporter's
25 Transcript, 19:3-5.)

26 Watermaster followed this directive and on October 25, 2007 filed its *Motion for Approval of*
27 *the Peace II Documents*, and requested a hearing on this Motion for November 29, 2007. On
28 November 15, 2007, the Court issued an *Order to Show Cause Why The Court Should Not Continue*

**Watermaster Response to Special Referee's Preliminary Comments and Recommendations on
Motion for Approval of Peace II Documents**

1 *The Hearing On Motion for Approval of Peace II Documents* (“Motion”). On November 27, 2007,
2 the Special Referee filed her *Preliminary Comments and Recommendations on Motion for Approval*
3 *of Peace II Documents* (“Report”). On November 29, 2007, Watermaster appeared and presented
4 testimony and argument regarding approval of the Peace II measures and requesting the Court not to
5 continue the hearing.

6 Watermaster Counsel volunteered to respond to the Special Referee’s Report within seven
7 days of the hearing and to further file a supplemental technical analysis from Mr. Wildermuth to
8 assist the Court in the evaluation of the potential physical consequences of implementing the Peace
9 II Measures within fourteen days. This pleading represents the fulfillment of the first of those
10 commitments, delayed only by the Watermaster’s receipt of the Court Reporter’s Transcript on
11 Tuesday, December 11, 2007.¹

12 Watermaster submits this Response to the Special Referee’s Report in the hope that it will
13 provide clarification to the Court concerning the issues raised in the Report. Part VI of this Response
14 provides a line by line response to the myriad issues raised by the Referee.² Watermaster also
15 requests guidance in its relationship with the Court when presenting unopposed issues for
16 consideration.

17 **A. The absence of a traditional “case or controversy” has complicated**
18 **the current approval process**

19 Watermaster accepts and embraces that the Court has plenary power to approve Judgment
20 amendments and that the Court is charged with a duty to consider the public interest in its review of
21 Watermaster proposals.

22 Watermaster’s legal existence springs from the Judgment. All of Watermaster’s enumerated
23 powers originate within and arise from the Judgment. It is not a public agency or private entity that
24 has been formed under some general or special law. Its duty is “to administer and to enforce the
25 provisions of this Judgment and any subsequent instructions or orders of the Court hereunder.”

26 _____
27 ¹ The Court has not issued an Order concerning the Order to Show Cause or the appropriate schedule.

28 ² The technical issues raised by the Referee are addressed in a separate document that is being prepared by Mark Wildermuth, which will be filed at a later date.

1 (Judgment ¶ 16, lns.19-20.) As all special masters, Watermaster operates as an extension of the
2 Court and to meet the needs of the Court in carrying out its obligations under the Judgment and
3 Article X, Section 2 of the California Constitution.

4 Watermaster's function is not unique to this Judgment. Although there are nuances that are
5 peculiar to Watermaster's procedures and the depth and breadth of its role under the Judgment, each
6 of the adjudicated groundwater basins in California have a Watermaster with defined
7 responsibilities. (See Bloomquist, *Dividing the Waters: Governing Groundwater in Southern*
8 *California* (San Francisco: Institute for Contemporary Studies) (1992).) This is true whether the
9 Watermaster was organically established by stipulation and entry of Judgment or through an
10 adversarial process.

11 The traditional role of Watermaster and its interface with the Court is made more complex in
12 the Chino Basin by the existence of a Referee and her technical assistant who also serve as an
13 extension of the Court. No other adjudicated groundwater basin has both a Watermaster and a
14 referee and the Chino Basin Judgment does not provide for one. (*City of Pasadena v. City of*
15 *Alhambra* (Superior Ct. L.A. County, 1984 (Modified and Restated), No. Pasadena c-1323)
16 (Modified and Restated Raymond Basin Judgment); *Upper San Gabriel Valley Municipal Water*
17 *District v. City of Alhambra, et al.* (Superior Ct. L.A. County, 1972 (amended 1989), No. 924128)
18 (Amended Main San Gabriel Basin Judgment); *Southern California Water Co. v. City of La Verne,*
19 *et al.* (Superior Ct. L.A. County, 1998, No. KC0229152) (Modified Six Basins Judgment); *City of*
20 *Los Angeles v. City of San Fernando* (Superior Ct. L.A. County, 1979, No. 650079) (Upper Los
21 Angeles River Area Judgment); *Central and West Basin Water Replenishment District, etc., vs.*
22 *Charles E. Adams, et al.* (Superior Ct. L.A. County, 1991, No. 786,656) (Central Basin Judgment);
23 *California Water Service Company, et al. vs. City of Compton, et al.* (Superior Ct. L.A. County,
24 1980, No. 506,806 (West Coast Basin); *City of Barstow v. City of Adelanto* (Superior Ct. Riverside
25 County, 1994, No. Civ. 208568 (Mojave Basin); *California American v. City of Seaside, et al.*
26 (Superior Ct. Monterey County, 2006, No. M66343) (Seaside Basin).)

1 In general, the appointment of a referee to investigate disputes and make reports to the Court
2 is within the Court’s discretion – as is the appointment of Watermaster. Both Referee and
3 Watermaster serve at the pleasure of the Court.

4 The procedural complexity of the interface between the Referee and Watermaster takes on
5 greater importance in those situations such as the instant case where a Watermaster recommendation
6 is not opposed by any party and is actually affirmatively supported by the vast majority of
7 stakeholders. The customary definition of a “referee” is one that will “judge, umpire, mediate,
8 adjudicate or arbitrate.” As there is no dispute or “case or controversy” to judge, umpire, mediate,
9 adjudicate or arbitrate, there is no process under the Judgment that allows Watermaster or the parties
10 to know or anticipate issues or concerns that may be articulated by the Referee and her technical
11 assistant prior to them being announced in response to a Watermaster motion in the Referee Report.
12 Because no party has contested Watermaster’s request for approval of the Peace II Measures it is the
13 Referee’s Report itself that actually serves to create the “case or controversy.”

14 One would presume the reason for not having earlier pronouncements is that Courts typically
15 loathe to issue advisory opinions and that if there is no “case or controversy” there is no need for
16 an opinion. Hence the conundrum that arises where Watermaster, with the consent and support of the
17 parties, places a matter before the Court for approval without knowledge of potential issues that are
18 “at issue” and in need of rebuttal or further explanation.

19 The concerns that follow from this complexity are not academic. Over the past seven years,
20 the parties have made hundreds of millions of dollars in investments and implemented projects and
21 programs in furtherance of the Optimum Basin Management Program (“OBMP”). At the admonition
22 of the Court and under the direction of the nine-member Board, Watermaster has tirelessly worked
23 towards consensus, and in most cases it has achieved unanimity that has been the platform for
24 moving forward. During this same period there has not been a single contested matter that has been
25 heard by the Court.

26 Where the parties have labored long to achieve a broad consensus of support and in fact
27 obtained unanimity through related agreements, the Referee’s criticism or suggestions, however
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1 well-intended, can serve to instigate new rounds of negotiations and undermine the ability of the
2 Watermaster and the parties to move forward now and in the future. As with all contractual
3 negotiations, parties made concessions to obtain the benefits of the coordinated effort. Parties will be
4 discouraged from making compromises in favor of taking their chances in an adversarial process if
5 announcing a previously unformulated and undisclosed position of the Referee converts hearings for
6 approval from a prima facie showing on a stipulation to an adversarial hearing in which a portion of
7 negotiated benefits are denied a stakeholder group. In a world of water chaos and water conflict,
8 Watermaster’s view is that consent of the parties represents compelling, unrebutted evidence that the
9 Peace II Measures are both consistent with the Judgment and in the public interest.

10 Watermaster requests guidance from the Court as to how Watermaster should integrate its
11 function with the role of the Referee and its burden of producing evidence and burden of proof
12 where consensus and non-opposition is put to the test by the Referee’s Preliminary Report. Further,
13 Watermaster requests that the Court establish uniform procedural ground rules for those instances
14 where a report of the Referee will be required and to provide appropriate notice where the Referee
15 acts as an extension of the Court and as a quasi-adversary to Watermaster, also an extension of the
16 Court.

17 **B. The Watermaster structure itself is designed to avoid a “Tragedy of**
18 **the Commons”**

19 Watermaster’s objective is to achieve the optimum management of the Basin as contemplated
20 by paragraph 41 of the Judgment and to meet the obligations of Article X, Section 2 of the California
21 Constitution. Wisdom and experience suggest that the best way to accomplish that is with the broad
22 support of the parties charged with the burden of implementation.

23 The Court has alluded to its lingering concern for the “tragedy of the commons” as a cause
24 for enhanced scrutiny of matters framed for Court approval through consensus. The implication is
25 that although consensus has been reached, the parties might each individually pursue their own self-
26 interest with the consent of the others to the cumulative detriment of the Basin. However, this
27 concern overlooks the limitations on the parties that arise from the injunction set forth in paragraph
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1 13 of the Judgment which prohibits unauthorized withdrawals. More importantly, it undervalues the
2 Court’s own active involvement under the Judgment and in its appointment of the nine-member
3 Board and recent history.

4 As a representative entity, three board seats for Watermaster are held by popularly elected
5 directors from municipal water districts, one of which is currently a retired Judge of the Superior
6 Court. Two other directors are currently appointed from City councils, also popularly elected. One
7 council member is a former Director of the California State Water Resources Control Board
8 (“SWRCB”). Another board member was appointed from the elected board of a special district. The
9 two board members that represent the Overlying (Agricultural) Pool also sit on the Board of the
10 Chino Basin Water Conservation District. The ninth member representing the Overlying (Non-
11 Agricultural) Pool is from private enterprise and has the benefit and experience of sitting on the
12 board of the Main San Gabriel Basin Watermaster.

13 As structured by the Court, this Board is not dominated by any interest or stakeholder group.
14 The various perspectives are diverse and allow for cross-checks and counter-balances. Moreover, the
15 Board is fairly representative of nearly a million people.

16 Unfortunately, as explained in more detail below, the Referee Report treats the unanimous
17 support for the Peace II measures as largely irrelevant and generally gives little or no weight to the
18 recommendations of Watermaster – the entity appointed by the Court to administer the Judgment.
19 For purposes of evaluating Watermaster’s Motion to approve the Peace II Measures, we ask that due
20 consideration be given to the Court’s prior decision to appoint Watermaster as the entity responsible
21 for administration of the Judgment and that great weight be given to unopposed Watermaster
22 proposals. Surely the history of the past seven years suggests this deference is warranted and it is not
23 inconsistent with the Court’s desire to have further information and the need to make a record for
24 posterity.

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1 **C. Peace II and the Physical Solution**

2 **1. The Physical Solution contemplated the development of**
3 **management techniques not envisioned in 1978**

4 Paragraph 39 of the Judgment explains that the purpose of the Physical Solution provided by
5 the Judgment is to:

6
7 [E]stablish a legal and practical means for *making the maximum*
8 *reasonable and beneficial use of waters of the Chino Basin* by
9 providing optimum economic, long-term, conjunctive utilization of
10 surface waters, ground water and supplemental water, to meet the
11 requirements of water users having rights in or dependent upon Chino
12 Basin. (Judgment ¶ 39.)

13 One of the core tasks for Watermaster is to implement the OBMP. (Judgment ¶ 41.) As the
14 name suggests, the purpose of the OBMP is to find a way to manage the Chino Basin in an
15 “optimum” manner. The word “optimum” as it occurs in the Judgment is used in a non-technical
16 sense to simply refer to an attempt to manage the Basin in the best manner possible. Optimum Basin
17 management in this sense should take account of a variety of factors, including the requirements of
18 state law including Article X, Section 2 of the California Constitution, the public interest, and,
19 perhaps most importantly, the dictates of the 1978 Judgment.

20 In addition to the requirement to maximize the beneficial use of water, the Judgment notes
21 the need to

22 [P]rovide *maximum flexibility and adaptability* in order that
23 Watermaster and the Court may be free to use existing and future
24 technological, social, institutional and economic options to maximize
25 the beneficial use of the waters of the Chino Basin. (Judgment ¶ 40.)

26 Central to the Judgment is the priority extended to maximizing beneficial use and the
27 understanding that neither the world nor technology would remain frozen in 1978. Paragraph 40
28 contemplates that Watermaster’s discretion would be supplemented as necessary by the Court under
its continuing jurisdiction to respond to requests similar to that made by Watermaster and the parties
through the Peace II Measures that seek to take advantage of improvements in management
strategies and an improved technical understanding.

1 As noted in previous Watermaster filings, the process to bring forward the Peace II Measures
2 began with a consideration of the provisions in the existing OBMP and the Peace Agreement that
3 required the further exercise of discretion by Watermaster, including the Court's requirement for
4 reporting on Watermaster's plans for Future Desalters.

5 **2. In its most general sense Basin Reoperation has legal and technical**
6 **precedent**

7 A form of controlled overdraft was expressly permitted by the Judgment and limited to a
8 cumulative quantity of 200,000 acre-feet, with an annual cap of 10,000 acre-feet. (Judgment, Exhibit
9 "I" at ¶ 2.) This was permitted by the Judgment for largely economic reasons to allow the parties
10 time to adjust to safe yield management. (Stark, July 11, 1978 Post Trial Memorandum, §C(2).)

11 In the instant case, Watermaster requests to increase that quantity by an additional 400,000
12 acre-feet. However, while there may be economic benefits, the primary reasons for pursuing the
13 strategy all relate to enhancing opportunities for beneficial use. The economic benefits are actually
14 earmarked for the desalting of groundwater and thus operate as a partial subsidy to off-set a portion
15 of the significant capital and operating costs. (Peace II Agreement, § 5.8(a)(2); § 7.2(a).)

16 More than three years ago, the analysis of monitoring data and modeling results collected and
17 analyzed by Watermaster indicated to Watermaster's consulting technical advisor, Mr. Wildermuth,
18 that the best way to manage the Chino Basin would be in a condition where water levels are lower
19 than they are now. In itself, this is not a remarkable result.

20 In one of the seminal cases in California water law, the California Supreme Court previously
21 recognized the value of lowering water levels in a groundwater basin in order to enhance the
22 recharge opportunities in that Basin. (*City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d
23 199, disapproved on other grounds in *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th
24 1224, 1248 [hereinafter *Barstow*].) In that case, the water to be mined from the Basin was given the
25 term "temporary surplus." (*Id.* at 280.) While this water could have perhaps been saved in storage
26 for use in a time of drought or other emergency, the long term management benefits were apparently
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1 deemed to outweigh an unknown and potential use for the water at some indeterminate time in the
2 future.

3 Further, the *San Fernando* court cited to another landmark groundwater case which also
4 recognized that the state’s policy is to discourage waste and therefore held that the taking of
5 “temporary surplus” prevents the commencement of overdraft because it increases the total available
6 supply by eliminating waste which would occur if there was no storage space for precipitation. (*Id.*,
7 citing to *City of Pasadena v. City of Alhambra* (1949) 22 Cal.2d 908, 926, 929.)

8 Nor is this approach unique to groundwater. Viewed holistically, California water policy,
9 discourages locking up supplies in “cold storage” for future speculative uses. (*California Trout Inc.*
10 *v. State Water Resources Control Board* (1989) 207 Cal.App.3d 585, 619 (“[D]ue diligence does not
11 countenance a scheme placing water rights in cold storage for future use”); *cf. Central Delta Water*
12 *Agency v. State Water Resources Control Board* (2004) 124 Cal.App.4th 245, 267 (invalidating a
13 SWRCB grant of a permit where the end user remained undefined); *Nevada County & Sacramento*
14 *Canal Co. v. Kidd* (1869) 37 Cal. 282, 314 (“ . . . [N]o man shall act upon the principle of the dog in
15 the manger, by claiming water by certain preliminary acts, and from that moment . . . prevent the
16 development of the resource by others.”).)

17 In fact, California Constitution Article X, Section 2 was adopted to maximize beneficial use
18 by requiring higher levels of efficiency, not discourage it. (*Allen v. California Water & Telephone*
19 *Co.* (1946) 29 Cal.2d 466, 483-484; see further Water Code Section 106 that proclaims domestic use
20 as the highest beneficial use.) Indeed, this primary directive is expressly set forth in the Judgment.
21 (See Judgment ¶¶ 39, 40 and 41.)

22 At the recommendation of its engineering consultant Mr. Wildermuth, Watermaster first
23 contemplated a strategy to dewater a portion of the basin through controlled overdraft to cut off
24 discharges of poor quality water to the lower Santa Ana River for the purpose of increasing the
25 efficiency of water use within the Basin by reducing the discharge of wastewater and promoting the
26 use of recycled water. The proposed strategy suggested that the de-watering would be largely benign
27 and without negative impact to the Basin or other parties.

1 **3. Basin Reoperation makes maximum beneficial use of available supplies**

2 As the primary benefit, the Basin Reoperation strategy will have the effect of gaining greater
3 flexibility in the expanded use of recycled water throughout the Basin. In addition, it was
4 hypothesized that consistent with earlier technical work that gave rise to the OBMP, that future
5 desalting would have yield enhancement benefits.

6 Accordingly, the proposed strategy as ultimately defined by the Peace II Measures would
7 provide:

- 8 • access to 400,000 acre-feet of groundwater that is otherwise unavailable to the
- 9 parties because of the limitations contained within the Judgment;
- 10 • preservation of safe yield beyond that which would occur in the absence of the
- 11 expanded desalting capacity;
- 12 • new and converted water supplies for domestic use;
- 13 • expanded use of recycled water.

14 Individually and collectively these benefits maximize the beneficial use of water and reduce
15 reliance upon imported water supplies. Watermaster proposed this basic management strategy to the
16 parties and over the course of many months explored the underlying assurances and agreements that
17 would be necessary for them to make the investments to accomplish the identified tasks which
18 became known as Basin Re-Operation.

19 **4. The exhaustive process that led to development of the Peace II measures**
20 **is evidence that due consideration has been given to all aspects of the proposed**
21 **strategy**

22 An initial publication of proposed terms led to public workshops, stakeholder and Board
23 input and a revised set of principles embodied in the Stakeholders Non-Binding Term Sheet (“Non-
24 Binding Term Sheet”), dated May 23, 2006 that was promptly filed with the Court. The term sheet
25 was subject to several requirements that Watermaster and the parties expected would be fulfilled
26 *prior* to the Non-Binding Term Sheet being translated into a suite of binding agreements.

1 These steps included peer review of the 2003 Watermaster model that had been used to assist
2 in the evaluation of the efficacy of the proposed Reoperation and Hydraulic Control strategy.
3 Watermaster, of its own volition, suggested the Referee’s technical assistant be called upon to
4 provide that peer review. The peer review of the 2003 Model was completed approximately ten
5 months later in March of 2007.

6 Contrary to the implications in the Referee’s Report there has never been a requirement that
7 there be a “verification” of further refinements of the 2007 version of the Watermaster model. No
8 such obligation arises from the Non-Binding Term Sheet or Watermaster direction and the quoted
9 language does not appear in Watermaster pleadings or declarations. What Watermaster expected of
10 Mr. Wildermuth is that having obtained Mr. Scalmanini’s peer review of the 2003 Watermaster
11 Model, that he would incorporate all of the recommendations made by Mr. Scalmanini’s and that
12 Mr. Wildermuth would stay in constant contact with Mr. Scalmanini to ensure an expedited review
13 of the Court when the time came to review the Peace II Measures. Mr. Wildermuth reports that the
14 recommendations were incorporated and he communicated the changes to Mr. Scalmanini. (October
15 25, 2007 Declaration of Mr. Wildermuth, ¶ 4.)

16 To further expand its evaluation of the impact of the proposed Non-Binding Term Sheet upon
17 the broader community of the Inland Empire, the stakeholders required an analysis of the macro
18 economic benefits that would accrue to the Region. (Sunding, David, *Analysis of Aggregate Costs
19 and Benefits of Hydraulic Control, Basin Re-Operation and Desalter Elements of Non-Binding Term
20 Sheet*, November 29, 2006 (Resolution 07-05, Attachment “B”).) Paragraph 40 of the Judgment
21 envisions a consideration of the economic consequences of its decisions as does the Engineering
22 Appendix Exhibit “I.” This analysis suggested benefits as high as \$438.8 million in 2006 dollars
23 through the pursuit of the measures identified in the Non-Binding Term Sheet. (Resolution 07-05,
24 Attachment “B,” p. 1.)

25 Watermaster and the stakeholders also endorsed causing a second economic analysis to be
26 completed that would evaluate:

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1 [T]he impacts (positive and negative) of implementing the OBMP and
2 the Peace Agreement as well as those that may arise from Watermaster
3 pursuing the suite of actions set forth in this Non-Binding Term Sheet,
4 including but not limited to Watermaster assessments. This analysis
5 will specifically address the potential distribution of costs and benefits
6 among the parties that were initiated with the approval of the Peace
7 Agreement in 2000. (Non-Binding Term Sheet, dated May 23, 2006,
8 I.E.)

9 This evaluation was also completed by Dr. Sunding and considered benefits more specific to
10 each of the parties and was received as complete by Watermaster. (Sunding, David, *Report on the*
11 *Distribution of Benefits to Basin Agencies from the Major Program Elements Encompassed by the*
12 *Peace Agreement and Non-Binding Term Sheet*, October 17, 2007 (Resolution 07-05, Attachment
13 "C").) The report was never intended or offered by Watermaster as the definitive report or as the
14 final word on the allocation of benefits among the parties. It was intended as an aid to party
15 decision-making.

16 Rather than rely upon Dr. Sunding's work alone, some of the parties actually engaged their
17 own economic experts to provide input into the report and to each of the parties as to whether to
18 approve the Peace II Measures as a package. The study itself generated further dialogue by the
19 parties and the Watermaster Board, which authorized a collaborative effort among the stakeholders
20 to further evaluate the distribution of *costs and benefits* associated with the initial implementation of
21 the Peace Agreement and the proposed Peace II Measures. Of particular interest was the costs and
22 obligations assumed by the Inland Empire Utilities Agency ("IEUA") through parallel financing
23 efforts.

24 This focused process concluded with further refinements to the various agreements and
25 resolved the fairness of cost-allocation from the perspective of the stakeholders. The refinements
26 were approved by the Board and incorporated into the final version of the documents transmitted to
27 the Court on October 25, 2007. (Watermaster Minutes, 9/27/2007; October 25, 2007 Motion for
28 Approval of Peace II Documents and Attached Resolution.)

Over a period of almost 36 months, the process involved the negotiation of a complex set of
agreements that arose from the give and take necessary to allow expanded desalting and controlled

1 overdraft to occur. In the end, the Peace II Measures involved many elements that will result in a
2 mix of increased costs, expanded obligations and associated benefits.

3 Further discerning whether the suite of benefits obtained by any single party exceeds their
4 relative commensurate increase in obligations should not be the inquiry. This follows from the fact
5 that each agency must evaluate its individual position in relation to the many other issues that it
6 faces.

7 Watermaster, the Referee and the Court should not seek to second guess the individual value
8 placed on specific benefits or the reason why a party may be willing to assume a specific burden.
9 For example, water supply augmentation may not be the driving consideration to all parties.
10 Similarly, procurement of the lowest cost water may be irrelevant to a party that desires access to
11 expanded production.

12 Rather the task of Watermaster in implementing the Judgment is to successfully carry-out the
13 provisions of the Judgment requiring the maximization of beneficial uses within the constraints
14 provided by the Judgment. The Judgment requires the replenishment of production in excess of each
15 party's relative share of Safe Yield. To require replenishment while attempting to secure Hydraulic
16 Control would actually work at cross-purposes with the intended strategy. Accordingly, where, as in
17 the instant case, the constraints contained with the 1978 Judgment do not comport with the modern
18 vision of basin management, Watermaster and the parties have rightfully appealed to the Court to
19 amend the Judgment as envisioned by paragraph 40.

20 The prudent character of their request is underscored by the significant effort that
21 Watermaster has demonstrated to link the benefits of the controlled overdraft water to the more
22 specific Herculean task ahead: expand and operate the next phase of Desalting without a present
23 commitment of third party funding. The Peace II Measures expressly require that first priority for the
24 use of Controlled Overdraft be the Desalter proposed by Western Municipal Water District
25 ("WMWD"), but *if and only if*, WMWD meets the requirements of locating wells within a defined
26 area that will maximize the achievement of Hydraulic Control. (Peace II Agreement, § 5.8(a).)

27 **II. Generalized Response to Referee Report**

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1 The Referee Report raises many questions, to which Watermaster has prepared a
2 comprehensive response set forth below. The strongest comments were reserved for the alleged
3 failure to evaluate the Project proposed by Watermaster and to establish proper controls to ensure
4 that Watermaster fulfills its duties to complete its update to the Recharge Master Plan. As
5 Watermaster's oral argument stressed and this reply argues, the Referee misconstrued the purpose of
6 the Technical Report and misunderstood the integrated provisions of the documents.

7 There are always further questions that can be asked and there is always further technical
8 analysis that can be performed. A fundamental consideration is whether there is enough information
9 available to approve the Peace II Measures subject to the controls arising from the continuing
10 jurisdiction of the Court.

11 There are limitations based on practicality, and these practical considerations primarily relate
12 to time and expense. As the months and years drag by, the lost opportunities that come from failure
13 to implement management efforts that are known to be in the best interests of the Basin exact a cost
14 on the Watermaster parties and the communities they serve. The question is not whether every single
15 possible question has been analyzed and explained, it is not whether every bit of information has
16 been developed and refined to a scientific certainty – the question is rather whether the information
17 that has been developed is sufficient to make a reasonable and prudent decision about how to
18 proceed.

19 At some point, as the Court has alluded to in the past, the desire to gather more information
20 and perform additional studies can become paralysis through analysis. Further analysis at this point
21 becomes merely an excuse for inaction. While it is important to thoroughly analyze every question
22 and decision, so long as adequate controls exist, it is equally important to move forward and to begin
23 implementation.

24 Watermaster cannot purport to have a scientific certainty for Basin Reoperation and
25 Hydraulic Control and the physical impacts that may be attributable to the proposed project. But
26 Watermaster believes and the record reflects that after three years of consensus building, decades of
27 information development based upon historical experience and data gathering, the development of a
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1 Watermaster model, first peer reviewed in its 2003 form, then improved with input from the
2 Referee’s technical assistant, further analysis conducted to examine the potential for material
3 physical harm, there is now sufficient information to allow Watermaster to reasonably and prudently
4 proceed with the Peace II Measures.

5 Moreover, the Court may rely upon the present status of the information with the comfort of
6 knowing that it may rely upon its powers under the Judgment to direct and review Watermaster
7 actions. As its agent, Watermaster can collect information, report to the Court and recommend
8 courses of action based on that information.

9 **III. Standard of Review**

10 The Referee Report asserts that: “Watermaster Inappropriately Urges a Limited Review by
11 the Court.” (Report, 28:7.) The Referee notes Watermaster’s “contention” that the Judgment does
12 not provide a detailed explanation of the standard of review under Paragraphs 15 and 31.
13 Watermaster merely argued that because of this, the Court could look to other standards in the
14 Judgment, and to the nature of a stipulated judgment itself, and infer that a general deference to the
15 parties is appropriate where there is no opposition. The Referee suggests this standard is
16 “inappropriate” but offers no standard in its place.

17 Rhetorically, the Referee asserts that Watermaster “concedes” that in reviewing the Peace
18 Agreement, the Court analyzed whether the measures were consistent with and promoted the
19 Physical Solution under the Judgment. (Report, 29:11.) However, this point was not presented as a
20 concession by Watermaster as if it somehow undermines its position that in an uncontested matter
21 Watermaster and the parties should be entitled to deference. In fact, Watermaster explicitly states
22 that it is one of the Court’s roles to analyze Watermaster’s Motion pursuant to Article X, section 2.
23 (Motion, 16:3.) It is true that the Court must consider whether any action of Watermaster is
24 consistent with the Physical Solution and the Judgment. The Physical Solution set forth in the
25 Judgment contemplates a long-term safe yield management approach strategy and authorized an
26 exception of approximately 200,000 acre-feet for largely economic reasons. Because Watermaster
27 does not propose to alter long-term safe yield management and expressly embraces it, the more
28

1 precise issue Watermaster respectfully submits is whether the proposed exception – amounting to a
2 temporary excursion – for the purpose of effectuating Hydraulic Control and facilitating desalter
3 production is consistent with the Physical Solution.

4 Finally, the Referee presents a list of four factors that the Court “must” consider. These
5 include whether the evidence supports the Motion, whether the measures requested for approval
6 promote the Physical Solution under the Judgment,³ whether the measures are consistent with the
7 protection of the rights of the parties and the general public interest, and whether the measures are
8 contrary to Article X, section 2 of the California Constitution. (Report, 29:16-25.)

9 The Referee offers no citation for this list of factors, so it is not clear under what authority
10 the Court “must” use this list.⁴ However, Watermaster does not dispute they are all relevant inquiries
11 and the issues were described in Watermaster’s Motion and in the 1978 Plaintiff’s Post-Trial
12 Memorandum. Watermaster “concedes” that these factors should be considered by the Court.

13 However, to acknowledge the inquiries are legitimate does little to establish the guidelines
14 for how Watermaster responses will be weighed and evaluated against no opposition. Does
15 Watermaster shoulder a burden of proof beyond a prima facia showing when no evidence has been
16 presented to controvert Watermaster’s assertions, the joinders of the parties, the declaration and
17 testimony of the various witnesses and the reasonable interpretation (plain meaning) to be accorded
18 the written agreements?⁵

19 Assuming that substantial evidence is sufficient, Watermaster offers the following summary
20 as to the substantive areas identified by the Referee’s Report.

21 **A. Are the Peace II Measures Consistent with the Physical Solution**

22 As the term “physical solution” has developed as part of the common law of this state, it was
23 as a defense to the issuance of injunctive relief to protect senior water rights against infringement. In

24 _____
25 ³ The Referee does not indicate whether “consistency” with the Physical Solution is different from “promoting” the Physical Solution.

26 ⁴ The Report repeatedly references this list of factors and always cites back to this paragraph as the sole authority for the assertion.
(See, Report 35:18; 37:27-38:6; p. 40, fn 48.)

27 ⁵ The Referee Report offers no answer to this question and simply suggests that in the opinion of the Referee, Watermaster has not met
28 this unstated burden.

1 general, a physical solution exists as a complete defense to an injunction where a junior priority
2 cooperates with a senior right holder so as to avoid an injunction on the taking of water. (See *City of*
3 *Lodi v. East Bay Municipal Water District* (1936) 7 Cal.2d 316, 339-341; *Rancho Santa Margarita*
4 *v. Vail* (1938) 11 Cal.2d 501, 558-560.)

5 The concept of the physical solution recognizes that while water rights are property, which
6 are unique and which will support the issuance on an injunction, modification of historical water use
7 practices can be accomplished without hardship and in a manner that will support the broadest
8 possible number of beneficial uses. (See *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 383; *Tulare*
9 *Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 2 Cal.2d 489, 573-574.) For a “physical solution”
10 outside of an agreement, the proposed measure must not result in substantial injury or material
11 expense to the senior water rights. (See *Peabody v. City of Vallejo*, 2 Cal.2d 351 at 383; *Tulare Irr.*
12 *Dist. v. Lindsay-Strathmore Irr. Dist.*, 2 Cal.2d at 573-574.)

13 “Physical Solution” is not a defined term of the Judgment. However, consistent with the
14 common law and prevailing definition of the term, Article III expressly enjoins producing
15 groundwater in excess of the parties’ share of Operating Safe Yield *except pursuant to the Physical*
16 *Solution* or a storage water agreement. (Judgment ¶ 13.) Accordingly, no party may over-produce
17 (produce more than their allocated share) unless they do so pursuant to the stated Physical Solution.

18 Article VI is entitled “physical solution” and describes a program where no party is enjoined
19 from groundwater production in excess of their respective allocated shares so long as they pay
20 Watermaster assessments and reimburse Watermaster for the cost of securing replenishment water.

21 In relevant part, Article VI, paragraph 42 provides:

22
23 To the extent that pumping exceeds the share of the Safe Yield
24 assigned to the Overlying Pools, or the Operating Safe Yield in the
25 case of the Appropriative Pool, each pool will provide funds to enable
Watermaster to replace such overproduction. (Judgment ¶ 42, lns. 9-
12.)

26 The parties’ financial commitment to provide funds for the purchase of replenishment water
27 permits Watermaster to augment the native water supplies that initially constituted Safe Yield or
28

1 Operating Safe Yield that was apportioned among the parties. By providing a mechanism to secure
2 and finance the purchase of supplemental water in an amount equivalent to the overproduction, the
3 Physical Solution avoided substantial expense or material injury to the other users. Hence, no
4 limitation (injunction) on total groundwater production was required.

5 Against this backdrop, the question is whether the Peace II Measures are consistent with the
6 Physical Solution of limiting each party to their respective share of Safe Yield *unless* they provide
7 funds to Watermaster to purchase replenishment water? The answer is “yes.” There is precedent for
8 the proposed action, there is no objection and Watermaster has carefully linked the use of the
9 controlled overdraft to reducing reliance upon imported water and preserving Safe Yield.

10 All of the evidence offered by Watermaster supports the consistency *and* the promotion of
11 the Physical Solution by the Peace II measures. This conclusion follows first from the existence of
12 consent. No junior (let alone senior) user has claimed that the Peace II Measures will cause them
13 unmitigated harm. The package of corresponding burdens and benefits, summarized to some degree
14 by Dr. David Sunding, and then supplemented by further dialogue among the stakeholders were
15 deemed sufficient for the parties to consent to the proposed actions.

16 It also follows from the fact that the change in the management strategy from the
17 replenishment of all production to one that temporarily authorizes controlled overdraft for a defined
18 period is consistent with the party objectives to reduce reliance on the purchase of imported water
19 for replenishment through the substantial increase in the use of recycled water.

20 The Judgment itself previously countenanced 200,000 acre-feet of controlled overdraft for
21 largely economic reasons where far less was known about the Basin hydrology and without the
22 benefit of the Watermaster Model and nearly thirty years of operating history. (See Judgment
23 Exhibit “I”, ¶ 2) Surely if the Court authorized 200,000 acre-feet of controlled overdraft under the
24 circumstances then existing in 1978, the state of information and risk presented are no greater here.

25 Moreover, the economic benefit of the controlled overdraft is not lost on Watermaster.
26 Unlike unrestricted use of controlled overdraft that was authorized in the 1978 Judgment, the
27
28

1 controlled overdraft now sought by Watermaster in connection with the Peace II Measures requires
2 that the water be dedicated to groundwater production by the Desalters.

3 In other words, this is *not* a situation where there is risk arising from the tragedy of the
4 commons. Instead, the water that is produced to meet the objectives of Reoperation and Hydraulic
5 Control is being earmarked for the parties assuming the greatest financial burden: the operation of
6 the Desalters. (Peace II Agreement, § 5.8(a)(2); § 7.2(a).) Furthermore, even within the general
7 category of the Desalter Production, WMWD will obtain “first priority” to the use of the controlled
8 overdraft only if they construct the wells in a defined location intended to promote Hydraulic
9 Control. (Peace II Agreement, § 5.8(a).)

10 The Peace II measures will promote the construction of the final increment of desalter
11 capacity, which was a “major concern” of the Court in 2000 when the original Peace Agreement was
12 approved. Basin Reoperation will halt the outflow of water from the Basin which will preserve yield,
13 another major goal of the Peace II Measures.

14 Watermaster’s effort to operate the Desalters in concert with a yield preservation strategy has
15 already been endorsed by the Court. Without the economic benefit of subsidized groundwater
16 production from the Desalters, WMWD is not required to proceed with the expanded Desalter
17 production.

18 Basin Reoperation will also have the effect of inducing water into the Basin which will help
19 to mitigate for the anticipated reduction in Safe Yield.⁶ Conversely, there is no evidence in front of
20 the Court that would suggest that Basin Reoperation and Hydraulic Control are inconsistent with or
21 that do not promote the OBMP.

22 In the end, the Basin will remain subject to Safe Yield Operation. Over-production must be
23 replenished. The temporary excursion while the Watermaster pursues Hydraulic Control will last no
24
25

26 ⁶ In his “Summary of Model-Related Analyses” attached to the Referee Report, Mr. Scalmanini attempts to imply that it is Basin
27 Reoperation that causes the decline in Safe Yield: “All the latter safe yield values are now in notable contrast to the proposed
28 reoperation strategy that would **result** in a continuously declining safe yield . . .” (p. 3 (emphasis added).) This implication is
contrary to the clear statement by Mr. Wildermuth in his Declaration that the decline in safe yield is due to changes in land use and
will occur whether or not Basin Reoperation is pursued. (November 15, 2007 Declaration of Mr. Wildermuth ¶ 16 (p. 8, lns. 2-5).)

1 more than 22 years and substantially less if the rate of depletion is as is projected by the Final
2 Report, given the substantial controls that Watermaster and the Court retain.

3 **B. Promotion of General Public Interest and Protection of Private Rights**

4 With regard to the promotion of the general public interest and protection of private rights,
5 the deference to the unanimity of the parties is especially appropriate. Many of the most active
6 parties in the Basin are the cities and other public agencies that serve water to the public. These
7 entities are governed by Boards and City Councils that are popularly elected. They act in a
8 representative capacity of the water using public, which fundamentally includes every one of the
9 nearly one million people who live and work in the Chino Basin. The unanimity of these public
10 entities is the best evidence there is that the measures proposed for approval are in the public
11 interest.

12 In addition, Declarations were provided by Celeste Cantu who is the general manager of the
13 Santa Ana Watershed Project Authority (“SAWPA”), the entity whose jurisdictional area
14 encompasses the entire Santa Ana Watershed, and by Jeff Kightlinger, the general manager of the
15 Metropolitan Water District of Southern California, an entity whose jurisdictional area encompasses
16 nearly all of Southern California. (November 15, 2007 Declaration of Celeste Cantu in Support of
17 Motion For Approval of Peace II Documents, ¶¶ 4-5; November 15, 2007 Declaration of Jeff
18 Kightlinger in Support of Motion For Approval of Peace II Documents, ¶¶ 8-10.) These provide
19 further evidence that the Peace II measures are in the general public interest. The Referee
20 acknowledges that: “Major economic benefit will derive from the Peace II measures.” (Report,
21 33:25.)

22 With regard to the protection of private rights, the unanimity of the parties also provides
23 evidence to support granting Watermaster’s Motion. The private rights in the Chino Basin are held
24 by the individual parties to the Judgment. Joinders to Watermaster’s Motion have been filed by
25 nearly all of the appropriators and by the Agricultural and Non-Agricultural Pools. There have been
26 no objections by any parties in the Basin – the support for the Peace II measures is unanimous. What
27 better evidence can there be that there is no harm to the private rights in the Basin?
28

1 **C. Article X, section 2**

2 All water in the State must be used consistent with Article X, section 2 of the California
3 Constitution. As testified to by Mr. Wildermuth, the central purpose to pursuing the Basin
4 Reoperation strategy is to achieve Hydraulic Control, which is a requirement in order to gain access
5 to the Maximum Benefit Standards under the Basin Plan for the Santa Ana Region. (November 29,
6 2007 Reporter’s Transcript, 92:20-93:17.) The Maximum Benefit Standards are named as they are
7 because they are enacted under Water Code section 13241 and the State’s antidegradation policy
8 (SWRCB Resolution No. 68-16). Water Code section 13241 says that:

9
10 Each Regional Board shall establish such water quality objectives in
11 water quality control plans as in its judgment will ensure the
12 *reasonable protection of beneficial uses* and the prevention of
13 nuisance; however, it is recognized that it *may be possible for the*
14 *quality of water to be changed to some degree without unreasonably*
15 *affecting beneficial uses.* Factors to be considered by a regional board
16 in establishing water quality objectives shall include, but not
17 necessarily be limited to, all of the following

- 18 (a) Past, present, and probable future beneficial uses of water.
- 19 (b) Environmental characteristics of the hydrographic unit under
- 20 consideration, including the quality of water available thereto.
- 21 (c) Water quality conditions that could reasonably be achieved
- 22 through the coordinated control of all factors which affect water
- 23 quality in the area.
- 24 (d) Economic considerations.
- 25 (e) The need for developing housing within the region.
- 26 (f) *The need to develop and use recycled water.*

27 (Wat.Code § 13241, *emphasis added.*)

28 In 1991, this code section was amended by the addition of subdivision (f) which allows the
Regional Board to consider the “need to develop and use recycled water” when setting water quality
objectives in water quality control plans. (Wat.Code § 13241.) This amendment was made as part of

1 the Water Recycling Act of 1991. The legislative history of this bill demonstrates that the need to
2 develop recycled water was to be considered when developing water quality objectives. In fact, the
3 bill applied the existing definition of reclaimed water, which is “water that as a result of treatment of
4 waste, is suitable for a direct beneficial use or a controlled use that would not otherwise occur,” to
5 recycled water and declared that “reclaimed or recycled water is considered a valuable resource.”
6 (Chapter 187, A.B. No. 673, An Act to Amend Sections 13050 and 13241, and to added Chapter 7.5
7 of the Water Code (1991).) Clearly, Water Code section 13241, which includes the need to take into
8 account the development of recycled water was developed to further the goals of Article X, section 2
9 of the California Constitution. Therefore, Maximum Benefit Standards, which are authorized under
10 this water code provision are in accordance with the state’s mandate that “water resources of the
11 State be put to beneficial use to the fullest extent of which they are capable, and that the waste or
12 unreasonable use or unreasonable method of use of water be prevented.” (Cal. Const., Art. X, § 2.)

13 Further, section 13241 of Water Code tracks the language of Article X, section 2 using the
14 terms “reasonable” and “beneficial use.” That is, the Maximum Benefit Standards were enacted
15 under the authority of Article X, section 2 because a finding was made by the Regional Water
16 Quality Control Board (and approved by the SWRCB) that the Maximum Benefit Standards were
17 justified.

18 From a regulatory perspective, achieving Hydraulic Control facilitates the use of recycled
19 water in the Chino Basin. Recycled water is the most reliable supply available to the Basin because it
20 is the byproduct of municipal use, which continues consistently all year round every year. The
21 legislature has declared that “the use of recycled water is a cost-effective, reliable method of helping
22 to meet California’s water supply needs.” (Wat. Code 13576(f).) Historically this source of supply
23 has been wasted by the Chino Basin and largely allowed to discharge to the ocean. With the
24 regulatory approval from the RWQCB, based upon the promise of the Basin to achieve Hydraulic
25 Control, this source of supply is now available to the Basin.

1 The evidence presented by Watermaster in its Motion and in its testimony draws a direct link
2 between Basin Reoperation and Article X, section 2. This evidence is uncontroverted, and no party,
3 not even the Special Referee, has suggested any inconsistency with Article X, section 2.

4 **IV. Joinders**

5 The Referee's Preliminary Report overlooks the significance of the joinders and declarations
6 filed in support of Watermaster's Motion. While most all other documents and issues are described
7 in great depth by the Report, the Report gives only a bald acknowledgement to each of the filings
8 made in support of Watermaster's Motion, without giving appropriate evidentiary weight to their
9 contents. (Report, 2:21-3:16.)

10 For example, the Report notes, "a letter to Kenneth R. Manning from Robert W. Bowcock,"
11 (Report, 3:15) without also noting that Mr. Bowcock wrote the letter in his capacity as Watermaster
12 representative of the Non-Agricultural Pool and that the letter constitutes a joinder of the Non-
13 Agricultural Pool in Watermaster's Motion. At a minimum, the pleading constitutes an evidentiary
14 admission by Mr. Bowcock and is relevant to the inquiry of whether private rights are impaired.
15 Given the importance of protecting private rights to the Court's analysis, it would seem important to
16 note that an entire pool of private rights holders joins in Watermaster's Motion. Without rebutting
17 evidence, the prima facie showing of Watermaster should be sufficient.

18 The only filing gaining any material consideration was the filing by the Chino Basin Water
19 Conservation District, asking the Court to continue the hearing in to 2008. (Report, 3:19.) However,
20 this filing was further resolved by stipulation and now the Chino Basin Water Conservation District
21 also supports the Court's approval of the Peace II Measures. (November 27, 2007, Stipulation
22 Between Chino Basin Watermaster and Chino Basin Water Conservation District Regarding
23 Approval of Peace II Documents.)

24 Later, the Referee intimates that support for the Peace II Measures should be devalued
25 because the joinders are motivated by the receipt of benefits. "Not surprisingly, nine of the ten
26 agencies that receive benefits have filed papers in support of Watermaster's motion" (Report,
27
28

1 33:2-3.) However, the Referee fails to appreciate the irony of the remark and the very point of
2 consensus building that has been urged by the Court.

3 Parties do not support things they do not like. The existence and perception of broad benefits
4 is what makes the implementation of the Peace II Measures possible. From Watermaster's
5 perspective indeed, this is not surprising since nearly *every* agency in the Basin filed a joinder, as
6 well as all of the private interests as well. What better barometer that the public interest is being
7 met?

8 **V. Watermaster Standing**

9 Watermaster is puzzled that the Referee's Preliminary Report questions the standing of
10 Watermaster to ask the Court for review of a Watermaster action. (Report, 26:12-27:7.) Even though
11 Watermaster's Motion, signed by Watermaster General Counsel and approved for filing by the
12 Watermaster Board, recites the basis for Watermaster's authority to file, the Report intimates that
13 this is not sufficient and that additional declarations are needed to authenticate actions for which
14 there is no opposition.

15 These declarations are required even though no basis is given for doubting the veracity of
16 Watermaster and the Referee herself is on the service list and receives the minutes of the meetings in
17 which the basis for Watermaster's authority is confirmed. The Report even goes so far as to question
18 whether Watermaster actually adopted Resolution 07-05 (Report, 24:25-26) and suggests that the
19 signed copy submitted to the Court may not be authentic (Report, 25, fn 32). If the Court truly
20 desires Watermaster to further authenticate documents when there has been no party challenge to
21 their legitimacy, Watermaster will go to the unusual and uncustomary expense of supplementing the
22 filings for this purpose.

23 **VI. Miscellaneous Responses in Order of Appearance**

24 Page 1, line 25:

25 The Referee indicates that the Report is preliminary because of the limited time that has been
26 available to review so complex and extensive a set of documents. However, the Non-Binding Term
27
28

1 Sheet was first published on May 23 of 2006. The general concepts of Basin Re-Operation and
2 Hydraulic Control have been under evaluation since 2005.

3 While it is true that the Court was only presented with the final Peace II documents for the
4 first time at the end of October 2007, the Referee and her technical assistant have been aware of and
5 working with the issues in Watermaster's Motion for more than two years. This is clearly no sneak-
6 attack perpetuated on the Court.

7 Page 5, lines 8-14:

8 In the description of the Basin Plan Amendments, the Referee references the concept of
9 Hydraulic Control and its purpose to "protect" downstream water quality. Whenever the word
10 "protection" is used, it is placed in quotation marks. Watermaster under appreciates the significance
11 of the quotations. Watermaster accepts that "protection" of water quality is the issue.

12 In addition, the Report notes the protection of the Santa Ana River and the Prado basin area,
13 but fails to mention that one of the interests to be "protected" is the Orange County Water District
14 ("OCWD"), the only water user located downstream from the Chino Basin. OCWD is a party to the
15 Chino Basin Judgment and is therefore one of the private interests the Court is charged to "protect."
16 Further, Celeste Cantu, the General Manager of SAWPA, inclusive of the Orange County Water
17 District, is supportive of the Peace II Measures. (November 15, 2007 Declaration of Celeste Cantu
18 in Support of Motion For Approval of Peace II Documents, § 4-5.)

19
20 Page 5, line 15:

21 The Report says that Hydraulic Control is "simply" the continuation of a certain amount of
22 groundwater pumping in the southern part of the Basin. This is an incorrect definition. The proposed
23 amendment to Judgment Exhibit "I" defines Hydraulic Control as the reduction of groundwater
24 discharge from the Chino North Management Zone to the Santa Ana River to *de minimus* quantities.
25 The definition of Hydraulic Control is silent as to how the condition is attained. According to Mr.
26 Wildermuth, the way to achieve the condition is through Basin Reoperation. (October 25, 2007
27 Declaration of Mr. Wildermuth ¶ 16; November 15, 2007 Declaration of Mr. Wildermuth ¶ 21.)

1 Page 7, lines 8-9:

2 The Referee states that: “There has been no ‘verification’ of the 2007 Model by Mr.
3 Scalmanini, contrary to Watermaster’s statement.” (Report, 7, Ins. 8-9.) However, Watermaster is
4 unaware of any instance in which it inferred this. No citation to the quoted “verification” language
5 has been provided. Watermaster does contend that Mr. Scalmanini did perform peer review of the
6 2003 Model.

7 At Watermaster’s request, Mr. Scalmanini completed and transmitted a report in March 2007
8 which reviewed Watermaster’s model and provided recommendations. The testimony of Mr.
9 Wildermuth is that he incorporated these recommendations among other improvements into the 2007
10 Model. There is no controverting evidence.

11 Mr. Scalmanini’s report found that Watermaster’s model was adequate for planning purposes
12 and that there were additional refinements that could be performed to make it work better. Mr.
13 Wildermuth followed these recommendations. (October 25, 2007 Declaration of Mr. Wildermuth ¶
14 4; November 15, 2007 Declaration of Mr. Wildermuth ¶¶ 3-4; November 29, 2007 Reporter’s
15 Transcript, 98:8-12.) Given the existence of Mr. Scalmanini’s report and the testimony of Mr.
16 Wildermuth, there is substantial evidence that the 2003 Model was peer reviewed and improved with
17 recommendations from Mr. Scalmanini . (October 25, 2007 Declaration of Mr. Wildermuth ¶ 4;
18 Motion for Approval of Peace II Documents, 7:19-28.) A 2007 version of the model is improved
19 beyond that which was reviewed by Mr. Scalmanini. (Motion for Approval of Peace II Documents,
20 7:19-28.) There is no evidence rebutting the sufficiency of the 2007 Model.

21 Page 10:

22 The Report provides quotations from a limited number of locations in Watermaster’s Motion
23 where the proposed amendment to Judgment Exhibit “I” is discussed. The veiled implication is that
24 Watermaster’s Motion does not provide adequate discussion of the proposed amendment.

25 The amendment to Exhibit “I” is the amendment that authorizes Basin Reoperation. Basin
26 Reoperation is the primary subject of Watermaster’s Motion and is the sole subject of the
27 Wildermuth technical report and testimony.

28

1 Pages 11 to 13:

2 The Referee Report contends that the amendment to Judgment Exhibit "I" is not supported
3 by the Technical Report. This assertion arises from the Referee's review of the Final Report
4 prepared by Mr. Wildermuth and the fact the model run *predicts* that if Watermaster proceeded with
5 the proposed Rapid Depletion as the Initial Schedule (Resolution 07-05, Attachment "E," Desalter
6 Replenishment with Most Rapid Depletion of the Re-Operation Account) an additional 200,000
7 acre-feet might be withdrawn if Watermaster wanted to achieve a robust state of Hydraulic Control.

8 The Referee incorrectly assumes that the mere filing on the Initial Schedule combined with
9 the Wildermuth Final Model modified the Project Description or impliedly authorized the taking of
10 more than 400,000 acre-feet for the purpose of Hydraulic Control. This is incorrect. As pointed out
11 in oral argument the Project Description has two primary features: the expansion of the desalting
12 capacity and the planned withdrawal of 400,000 acre-feet. (Peace II Agreement, Attachment "A",
13 Project Description at pp. 4-5.) The Project Description has not been changed. There is no document
14 in all the materials transmitted to the Court that contains such a modification.

15 The apparent confusion likely follows from the failure to appreciate that the Initial Schedule
16 was only provisional and a basis to allow Mr. Wildermuth to run an analysis regarding whether there
17 would be material physical injury. (Peace II Agreement, § 7.2(e).) The Referee suggests that there is
18 no basis to substitute a revised schedule as there is no indication that the parties would agree to
19 another schedule. (Report, 13:19-22.) However, the Peace II Measures contemplate that the Initial
20 Schedule will be replaced within one year of the approval following a negotiation between WMWD
21 and the members of the Appropriative Pool. (Peace II Agreement, § 7.2(a) & (e).) Watermaster has
22 retained discretion to then adopt the recommended resolution or present its own to the Court. (Peace
23 II Agreement, § 7.2.) All changes in the schedule would require updated technical data and Court
24 approval.

25 As Mr. Wildermuth explained in his testimony at the November 29 hearing, the purpose of
26 the Wildermuth technical analysis was to determine whether Material Physical Injury would result
27 from the controlled overdraft. (November 29, 2007 Reporter's Transcript, 94:7-13.) The technical
28

1 report analyzed the withdrawal of up to 600,000 acre-feet. Mr. Wildermuth also analyzed
2 withdrawal of 400,000 acre-feet, as is evidenced by his Power Point presentation that was introduced
3 into evidence at the November 29, 2007 Hearing. (Exhibit 2, November 29, 2007 Wildermuth
4 Testimony Evaluation for the Peace 2 Project Description; November 29, 2007 Reporter’s
5 Transcript, 112-115.)

6 As Mr. Wildermuth testified, it is possible to achieve Hydraulic Control at the 400,000 acre-
7 foot level, and if withdrawing 600,000 acre-feet does not cause Material Physical Injury, then neither
8 will the withdrawal of 400,000 acre-feet. (Exhibit 2, November 29, 2007 Wildermuth Testimony
9 Evaluation for the Peace 2 Project Description; November 29, 2007 Reporter’s Transcript, 115:6-8 (.
10 . . . “my basic conjecture is if there’s no material physical injury at 600,000, there’s no material
11 physical injury at 400,000.”).) Accordingly, the lesser project is within what was studied assuming
12 that the Initial Schedule were followed. There is no evidence that has been presented to the Court to
13 challenge this opinion.

14 Moreover, it is a legal impossibility for the Initial Schedule to be followed because the
15 parties are expressly and unequivocally limited to the withdrawal of 400,000 acre-feet. The 400,000
16 acre-feet is being made available for an express purpose and under defined conditions. The
17 Judgment amendment itself limits the total quantity authorized.

18 The Referee notes that the Final Report *predicts* less New Yield and that this creates a
19 condition that is not addressed. This too is incorrect. A failure to achieve the “hoped-for” benefit of
20 New Yield does not invalidate the project, the Peace II Measures or any specific agreement.
21 Watermaster and the parties have properly contracted to account for the risks and benefits associated
22 with fluctuating New Yield. (Peace II Agreement, Art. VII) If there is less New Yield than desired,
23 Watermaster must either call upon the Controlled Overdraft account (to the extent there is some of
24 the 400,000 af remaining) or replenish groundwater production for the Desalters.

25 Page 14:

26 “Watermaster does not include any deadlines for submittal of an updated Recharge Master
27 Plan.” (Report, 14:17-18.) The existing requirements are to update the Recharge Master Plan every
28

1 five years. (Resolution 07-05, Attachment “D”, 2007 Supplement to the Implementation Plan
2 Optimum Basin Management Program for the Chino Basin at p. 4.) The next installment would be
3 due in 2010, just two years away. The Referee does not explain why such additional deadlines are
4 needed or what their purpose would be.

5 As Mr. Manning testified, Watermaster is a decade ahead of its recharge needs. (November
6 29, 2007 Reporter’s Transcript, 62:5-6.) Work on the next iteration of the Recharge Master Plan has
7 already begun.

8 The Referee further notes that: “The critical question is what happens if Watermaster either
9 does not further carry out its recharge planning process or does not implement the plan.” (Report,
10 14:19-20.) We agree this is critical. However, the response is equally obvious. Watermaster and the
11 parties have been operating successfully for nearly eight years and this track record of success
12 provides a reasonable basis for the Court to assume that Watermaster will meet its obligations.

13 Through the Peace II Measures, Watermaster has supplemented the Court’s review and
14 control in several ways set forth more fully below.

15 The Referee identifies Paragraph 2(b)(6) of the amended Exhibit “I” as the “obvious” answer
16 to this question. As explained by Mr. Slater at the hearing, however, this section is not at all intended
17 to answer this question. (November 29, 2007 Reporter’s Transcript, 46:16-48:2.). Paragraph 2(b)(6)
18 was designed to provide assurances to investors and to WMWD that the availability of Controlled
19 Overdraft would not be curtailed if Hydraulic Control was achieved prior to using all 400,000 acre-
20 feet set aside for that purpose.

21 With reference to the Judgment amendment, the appropriate provision is actually paragraph
22 2(b)(5) which contemplates Watermaster Rules and Regulations. However, in fact, the answer to the
23 question is to be found in the proposed revisions to the Rules and Regulations. (Resolution 07-05,
24 Attachment “F,” Watermaster’s Rules and Regulations.)

25 Page 15, line 12:

26 Guidance for these expected Rules and Regulations is contained within the Supplement to the
27 OBMP. It sets forth specific conditions that are attached to the availability of the Controlled
28

1 Overdraft. (Resolution 07-05, Attachment “D”, 2007 Supplement to the Implementation Plan
2 Optimum Basin Management Program for the Chino Basin.) The conditions include, among others,
3 the following:

- 4 1) Further desalter production facilities will emphasize production from the southern end of the
5 Basin;
- 6 2) Controlled overdraft must not cause material physical injury to any Party or the Basin;
- 7 3) A schedule for Re-Operation, including annual and cumulative quantities to be pumped will
8 be developed;
- 9 4) Watermaster will prepare an annual summary accounting of groundwater production and
10 desalting;
- 11 5) Watermaster must be in *substantial compliance* with its then existing recharge and
12 replenishment plans and obligations, and will make an annual finding whether or not it is in
13 compliance (emphasis added);
- 14 6) Groundwater produced by Desalters in connection with Re-operation to achieve Hydraulic
15 Control will be replenished through the water made available through controlled overdraft.

16 (Resolution 07-05, Attachment “D”, 20078 Supplement to the Implementation Plan Optimum Basin
17 Management Program for the Chino Basin, Reoperation (a)-(f).)

18 In addition, these are further supported by Section 8.3 of the Peace II Agreement which
19 expressly links access to the Controlled Overdraft to continuing compliance with Watermaster’s
20 Recharge Master Plan obligations. (Peace II Agreement, § 8.3 (“To ameliorate any long-term risks
21 attributable to reliance upon un-replenished groundwater production by the Desalters, the annual
22 availability of any portion of the 400,000 acre-feet set aside as controlled overdraft as a component
23 of the Physical Solution, is expressly subject to Watermaster making an annual finding about
24 whether it is in substantial compliance with the revised Watermaster Recharge Master Plan pursuant
25 to Paragraphs 7.3 and 8.1 above.”).)

1 With regard to paragraph 2(b)(6) of the Judgment Amendment, the Referee asks what is a
2 “contingency plan” and how does it differ from the Recharge Master Plan.⁷ This was addressed by
3 Mr. Manning in his testimony. (November 29, 2007 Reporter’s Transcript, 67:10-68:3.) In sum, the
4 Recharge Master Plan encompasses all strategies necessary to get water in the ground. The
5 contingency plan, on the other hand, would include strategies that would be used if there was a
6 problem with getting the water. For example, this might include implementation of additional
7 conservation measures, such as continuing to collaborate with IEUA on initiating conservation
8 measures, and working with cities to reduce demand. In addition, Watermaster might examine
9 recharge or pumping strategies that would shift the demand from one location where there is surplus
10 water to a drier location. (November 29, 2007 Reporter’s Transcript, 67:17-25.)

11 Page 15, line 16:

12 With reference to distribution of the costs of the contingency plan, the Referee asks, “What
13 does any of this mean?” As Mr. Manning explained in his testimony, it means that the costs will be
14 distributed in a manner that is equitable to the parties. (November 29, 2007 Reporter’s Transcript,
15 68:6-20.) For example, the parties may use pumping as an element in the equitable distribution of
16 costs. (November 29, 2007 Reporter’s Transcript, 68:6-20.)

17 Page 15, lines 19 through 24:

18 The Referee asks whether there is a clear and enforceable obligation to update the Recharge
19 Master Plan. Paragraph 2(b)(5) of Exhibit “I” makes the update to the Recharge Master Plan a
20 mandatory duty. If Watermaster and the parties are not in compliance with this requirement, then the
21 controlled overdraft of the Basin must cease. Mr. Wildermuth testified that it is possible for there to
22 be an immediate course correction if Material Physical Injury were to develop. (November 29, 2007
23 Reporter’s Transcript, 115:24-116:4.) The method to stop the controlled overdraft of the Basin
24 would be through the resumption of replenishment. The Court will be able to determine that the
25 controlled overdraft has been stopped simply through the reporting of the resumption of
26 replenishment in an amount sufficient to account for desalter production.

27
28 ⁷ This question is repeated by the Referee on page 41, line 21.

1 The Referee also questions the meaning of “substantial compliance” and the use of the term
2 “new equilibrium” in suggesting there are ambiguities in the commitments toward recharge and the
3 return the Basin. “Substantial compliance” is a customary legal term that is used to provided
4 flexibility and avoid hardship when evaluating good faith performance. (*People v. Green*, 125
5 Cal.App.4th 360, 371 (2004).)

6 Watermaster’s substantial compliance in moving towards its Court approved Recharge
7 Master Plan goals will be first evaluated by Watermaster. (Judgment ¶ 31.) If any party contests the
8 finding, it may be appealed directly to the Court. (Judgment ¶ 31.) In this way, the Court maintains
9 control over the development of the Plan itself and Watermaster’s ongoing progress.

10 Written agreements are accorded their “plain meaning.” The term “equilibrium” means “state
11 of balance”. (Webster’s Dictionary 5th Edition) In the context of moving from a period of Basin Re-
12 Operation and Controlled Overdraft, to one of “new equilibrium” – the plain meaning is – an end to
13 the preceding phase of overdraft and a return to balance, or safe-yield management.

14 Page 16, line 4-7:

15 The Report indicates that Watermaster’s recharge master planning must take in to account all
16 necessary future recharge needs, not just recharge for desalter pumping. The Peace II Measures set
17 forth requirements for the Recharge Master Plan requires that the cumulative pumping be considered
18 when calculating all recharge needs. (Resolution 07-05, Attachment “J” (Judgment Amendment to
19 Exhibit “I”) § 2(b)(5).)

20 More importantly, the Referee expressed surprise and concern over the downward trends in
21 Safe Yield predicted by the Final Report. Watermaster shares this concern. Indeed it would be a
22 travesty if the Safe Yield of the Basin was materially diminished over the next several decades.
23 Watermaster and the parties have already invested heavily in measures to retard erosion of safe yield
24 and to increase yield through physical improvements, it would be both uncharacteristic and wholly
25 without precedent for Watermaster to ignore information suggesting that its earlier investments will
26 be undermined.

1 The Court must appreciate that information is very new and further evaluation and better
2 understanding of the causes and whether they can be reversed or mitigated by methods other than
3 expanded recharge is warranted. That said, Watermaster must point out that the gravity of the
4 predicted condition in the Final Report actually grows worse if the Peace II Measures are not
5 implemented. (November 15, 2007 Declaration of Mark Wildermuth, ¶ 17.)

6 There can be no better place to address the subject of declining yield than in the proposed
7 Recharge Master Plan process. The Recharge Master Plan must include “recharge projections and
8 summaries of the projected water supply availability as well as the physical means to accomplish
9 recharge projections.” (Resolution 07-05, Attachment “J” (Judgment Amendment to Exhibit “T”) §
10 2(b)(5).) It is reasonable to conclude that the Plan must use certain baseline assumptions regarding
11 Safe Yield in projecting the replenishment needs and the role recharge will play in meeting them.
12 Accordingly, Watermaster intends to include an assessment of Basin safe yield and proposed
13 strategies to address predicted declines within the Recharge Master Plan. A lesser commitment
14 would be irresponsible.

15 Page 17 to 19:

16 The Referee contends that Watermaster has offered no explanation for the need for the
17 Judgment amendments relating to the Overlying (Non-Agricultural) Pool besides the fact that under
18 the current rules, water continues to accumulate in the storage account for the Non-Agricultural Pool
19 with no apparent way to free this stranded resource. Mr. Manning testified to this at the hearing.
20 (November 29, 2007 Reporter’s Transcript, 68:21-69:6.)

21 The Judgment did not contemplate that water would accumulate in storage because there is
22 no administrative way for the water to be used, and as described above such accumulation is
23 potentially in violation of Article X, section 2 of the California Constitution. Water should not be
24 held indefinitely in cold storage. (*California Trout Inc. v. State Water Resources Control Board* 207
25 Cal.App.3d 585, 619 (1989).)

26 Moreover, the liberation of the water serves important purposes to increase efficiencies;
27 storage and recovery, to off-set desalter production and to off-set other calls for imported water.
28

1 Page 17, footnote 16:

2 The Referee correctly identifies a typographical error (characterized as a “misquote”) in the
3 amendment to Judgment Paragraph 8. Watermaster will cause the correction of the typographical
4 error to be fixed.

5 Pages 19-20:

6 The Referee alleges that Watermaster does not address the issue of appurtenance and the
7 consequences of removing that requirement from overlying rights. The Referee states that
8 appurtenance is a fundamental aspect of overlying rights. However, in other adjudications the
9 appurtenance requirement has been relaxed or even eliminated entirely in the context of furthering
10 the physical solution. For example, the Mojave Judgment allows stipulating parties (which includes
11 overlying landowners) to sell or transfer their base annual production right according to rules and
12 regulations set forth in the Judgment. (*City of Barstow v. City of Adelanto* (Superior Ct. Riverside
13 County, 1994, No. Civ. 208568 (Mojave Basin), Mojave Judgment at ¶ 34.) The Mojave Judgment
14 provides that transfers must be made in accordance with certain rules that protect the basin and the
15 transferee must provide notice to the basin’s Watermaster. (Mojave Judgment at Exhibit F-1.)

16 In order to address this issue from a legal and policy standpoint, it is useful to examine the
17 history and policy reasons behind the appurtenancy requirement.

18 **1. Definition of Overlying Right: Nature of Connection to the Land**

19 In order to describe the appurtenance requirement, Courts have used the words “in
20 connection with” and “on” (*Katz v. Walkinshaw* (1903) 141 Cal. 116, 134), “for the benefit and
21 enjoyment of his land,” and “upon the land.” (*McClintock v. Hudson*, 141 Cal. 275, 277 (1903).) A
22 person who owns real property overlying a groundwater basin (an overlying owner) has a right to
23 extract groundwater from beneath his property (by means of wells) for use on his overlying land
24 within the watershed. (*Barstow*, 23 Cal.4th at 1240.) An overlying owner can pump water from one
25 point on the property and export it for use anywhere on the same parcel so long as the use occurs
26 within the watershed or drainage area of the basin. (SLATER, CALIFORNIA WATER LAW AND POLICY §
27 3.02 (2006 ed.).)

1 An overlying owner’s right is correlative with all other overlying users’ rights. The overlying
2 owner is limited to a proportionate, correlative, and reasonable share of the common supply. (*Katz*
3 *v. Walkinshaw*, 141 Cal. 116.) Absent an adjudication, the overlying owner is not entitled to a
4 specific quantity of water because, by definition, the amount of water to which the overlying owner
5 is entitled fluctuates with the present need of the landowner. (*Prather v. Hoberg* (1944) 24 Cal.2d
6 549, 559-60.) Rather, the correlative right is a shared right to some proportion of the water supply,
7 which is measured by the equal and mutual rights of the other overlying landowners. (*Barstow*, 23
8 Cal.4th at 1241.)

9 There is no requirement that the landowner immediately intend to use the water to vest title
10 of the right. The right is “part and parcel” of the land. (*City of Pasadena v. City of Alhambra* (1949)
11 33 Cal.2d 908, 925.) The overlying right consists of a present right to use water for existing and
12 prospective uses. (*Peabody v. City of Vallejo* (1935) 2 Cal.2d 351.) Thus, the right may remain
13 unexercised or “dormant,” at least in times of surplus.

14 Generally, overlying rights may not be transferred. The export of groundwater from land
15 overlying a groundwater basin to land not overlying that basin is considered to be an appropriative
16 use of water. The right, however, is merely a provisional right to use surplus water in excess of the
17 cumulative needs of all overlying landowners who rely on the basin. (*City of Pasadena v. City of*
18 *Alhambra* (1949) 33 Cal.2d 908, 925; *Moreno Mut. Irr. Co. v. Beaumont Irr. Dist.* (1949) 94
19 Cal.App.2d 766.) If the water to be transferred is subject to existing needs – e.g., not surplus – it is
20 not subject to transfer. In the event an export of water will result in injury to an existing water right
21 user, it may be enjoined. (*Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 524-
22 525; *Corona Foothill Lemon Co. v. Lillibridge* (1937) 8 Cal.2d 522.)

23 2. Rationale for Appurtenance Requirement

24 In exchange for the limitations imposed on overlying rights, overlying rights, like riparian
25 rights, have several shared benefits. Overlying rights are the highest priority right to any water
26 supply in most cases. In addition, these rights do not have to be used to be constitutionally protected
27 from forfeiture. (*Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.*, 3 Cal.2d 489.) The rationale for
28

1 this priority is that there is a preference for use within areas where this water originates. One of the
2 reasons that the common-law concept of riparian rights was adopted by the Supreme Court was the
3 existence of a policy preference for water uses occurring within a watershed. This allows the
4 maximum benefit of the local supply to be achieved. (Anderson, *Riparian Water Rights in*
5 *California, Governor's Commission to Review California Water Rights Law* (1977) at pp. 19-21.)

6 The appurtenance requirement for overlying uses was modeled after the riparian model of
7 water rights. The law and the policy reasons behind the appurtenance limitation were first described
8 by the California Supreme Court in *Katz v. Walkinshaw* (1903) 141 Cal. 116, 134: "The doctrine of
9 reasonable use ... limits the rights of others to such amount of water as may be necessary for some
10 useful purpose *in connection with* the land from which it is taken" (italics added). Later in the same
11 paragraph, Justice Shaw described the "inconvenience from attacks on the title to waters
12 appropriated for use on distant lands made by persons who claim the right to the reasonable use of
13 such waters on their own lands." *Id.*

14 In *Cohen v. La Canada Land & Water Co.* (1904) 142 Cal. 437, 439: the court found "it has
15 been established by these cases [*Katz* and subsequent cases] that the right of an owner of land to use
16 water percolating therein is a right only to a reasonable use thereof *for the benefit and enjoyment of*
17 *his land*" (italics added). The court in *Burr v. Maclay Rancho Water Co.* (1908) 154 Cal. 428, 436
18 noted:

19 The land being so situated that it has the natural advantages afforded
20 by the underlying water, the conditions are analogous to those
21 affecting land riparian to a stream, which, because of its situation with
22 reference to the stream, is given rights to the waters thereof, so far as
23 necessary for use *thereon*, which are paramount to the right of another
24 riparian owner to divert the water to lands not riparian. The
25 reasonable rule here would be to hold that the defendant's
26 appropriation for distant lands is subject to the reasonable use of the
27 water on lands overlying the supply, particularly in the hands of
28 persons who have acquired it because of these natural advantages, and
we therefore hold this to be the law of the case with respect to the
lands upon which no water has been used by the plaintiff. In the case
of either class of owners of overlying lands, the appropriator for use on
distant land has the right to any surplus that may exist. (Italics added.)

1 These two cases highlight that the appurtenance requirement prevents an overlying owner from
2 transferring water to distant land and in turn, protects all the overlying landowners who may have
3 purchased the land to take advantage of its location in relationship to a groundwater basin or water
4 body. Further, this preference may have also stemmed from the belief that the competing
5 appropriation system would “lead to a massive and immediate exploitation of our state’s water
6 supplies.” (SLATER at 3-12.) Today our common laws continue to prefer uses within the river or
7 basin. (*Id.* at 3-13.)

8 Although overlying rights and the requisite appurtenance requirements continue to exist
9 today, there are signs of change. In 1978, the Governor’s Commission to Review California Water
10 Rights Law (“Governor’s Commission”) recognized that the major dam-building era in California
11 was over. Because water was becoming increasingly scarce due to rising construction costs and
12 opposition to large scale water projects, the Governor’s Commission recognized the need to shift to
13 making more resourceful use of already developed water supplies, improving efficiency by
14 providing economic incentives for water conservation and establishing procedures to aid voluntary
15 transfers. (Governor’s Commission to Review California Water Rights Law, Final Report 50-51
16 (Dec. 1978).)

17 In addition, instead of succumbing to the tragedy of the commons found in groundwater
18 basins, the concept of groundwater adjudications was developed in California. Through negotiation,
19 water producers entered into a series of negotiations, through which they were able to form
20 institutional structures that pooled public and private governance, to impose restrictions on
21 withdrawals, and to institute conservation measures. (Choe, Olivia S., *Appurtenance*
22 *Reconceptualized: Managing Water in an Era of Scarcity*, 113 Yale L.J. 1909, 1946 (2004).) Thus,
23 private actors were able “to impose constraints on themselves” within the public arena. And finally,
24 the negotiations among parties led to a better clarification of rights, which in turn allowed a market
25 to develop, leading to a transfer of rights to those using them at “a higher value.” (*Id.*) It is important
26 to note that groundwater adjudications were not in existence when California adopted the overlying
27 rights system.

1 A review of the history of overlying rights reveals that the main public policy reasons behind
2 the appurtenance requirement include: (1) a preference for water uses occurring within a watershed
3 (to ensure water returns to its source); (2) protection of investment backed expectations that
4 accompany the purchase of overlying land; and (3) to prevent exploitation of our state's water
5 supplies. Though these are all valid reasons for the appurtenance requirement which accompanies
6 rights in the common law arena, none apply in the case of an adjudicated basin. Within the realm of
7 an adjudication, these policy reasons are no longer germane.

8 Here, Watermaster seeks to relax the inflexible appurtenance requirement to further the
9 beneficial use of water within the Basin. If water is transferred to Watermaster, it may use the water
10 for Desalter replenishment, in a Storage and Recovery Program, or transfer it to appropriators. All of
11 these programs ensure the Basin remains healthy and water is transferred to the highest beneficial
12 use, which overrides any preference for restricting water use to overlying land and therefore
13 ensuring water remains within a watershed. Lastly, relaxing the appurtenance requirement to allow
14 further transfers will not lead to the exploitation or transfer of water outside of the Basin. Instead, it
15 will have quite the opposite effect: the transfers will further protect the health of the Basin, by
16 providing water to replenish the Basin.

17 In sum, there are no practical or public policy grounds as to why the appurtenance
18 requirements of an overlying right should restrict Watermaster from allowing parties to transfer
19 overlying rights in accordance with Watermaster-imposed guidelines.

20 Page 20, footnote 21, line 25:

21 The Referee contends that section 4.4 of the Peace II Agreement is inconsistent with Exhibit
22 "G" paragraph 6 regarding assignment of Non-Agricultural Pool rights. Paragraph 6 of Exhibit "G"
23 refers to the situation where an appropriator is providing water to a Non-Agricultural Pool member
24 in lieu of that party pumping water. It says nothing about the situation where a member of the
25 Appropriative Pool (such as a city) owns overlying property and pumps water for an overlying use
26 on that property. This is the situation contemplated by section 4.4.

27 Pages 21-22:

28

1 The Referee contends that the amendment to Judgment Exhibit “G” will not allow the one-
2 time purchase of Non-Agricultural Pool water. As explained in Watermaster’s Motion (Motion
3 16:23), the one-time transfer is intended to be conducted under the 2000 Judgment amendment that
4 allows the water to be transferred to Watermaster for use in a storage and recovery program or for
5 desalter replenishment. This aspect of the transfer does not require a further Judgment amendment.

6 The annual transfer, on the other hand, is a transfer intended primarily to distribute the water
7 to the members of the Appropriative Pool. Every year the members of the Non-Agricultural Pool can
8 determine how much of their available water they wish to make available for this transfer.

9 It is only in the situation where Watermaster is unable to use the one-time transfer water for
10 either a storage and recovery program or for desalter replenishment that the water will be distributed
11 to the members of the Appropriative Pool. (Resolution 07-5, Attachment “G,” Purchase and Sale
12 Agreement, § H.) Section H of the Purchase and Sale Agreement specifies that if the water is unable
13 to be used in a storage and recovery program or for desalter replenishment, then the Purchase and
14 Sale Agreement will *terminate*. This is why section H is titled, “Early Termination.” In the event that
15 the agreement terminates, then the water effectively becomes available to the Non-Agricultural Pool
16 for transfer under the annual transfer. Since the water will already have been paid for, the Purchase
17 and Sale Agreement automatically moves it in to the category of the annual transfer and specifies
18 that the water will be distributed according to the requirements of Paragraph 9(iv) of the amended
19 Exhibit “G.”

20 It is only under the assumption that Exhibit “G” has been incorrectly drafted that the Referee
21 contends that the reference in Paragraph 9(iv) to Watermaster Rules and Regulations should instead
22 refer to the Purchase and Sale Agreement. (Report, 21:24; 21:27.) In fact, the reference to the Rules
23 and Regulations is correct.

24 Page 22, footnote 27:

25 The Referee correctly notes a typographical error in the reference of shares of Operating Safe
26 Yield with reference to the Non-Agricultural Pool. The correct reference should be to shares of Safe
27 Yield.

28

1 Page 22-23:

2 The Referee labels the Special Project OBMP Assessment as a “tithe.” The significance of
3 this label is never explained. However, the Referee does suggest that this assessment could be
4 construed as a reallocation of Safe Yield. This is incorrect. The assessment is a monetary assessment
5 based on the party’s share of Safe Yield, just as are many Watermaster assessments. The Non-
6 Agricultural Pool member is given the option in any given year to pay the assessment in water rather
7 than money, but this is just a payment option and cannot be construed as a reallocation of rights to
8 Safe Yield.

9 Page 31, footnote 38:

10 The Referee recommends that the parties reconsider the Sunding analyses in light of new
11 information regarding New Yield. The purpose of the Sunding analyses were to provide the parties
12 with the best information and analysis of that information available at the time in order to assist their
13 decision making with regard to the Peace II document. It must be understood that as new
14 information is developed that the analyses will become dated. There was no intention by the parties
15 under the Non-Binding Term Sheet that the analyses would continue to be updated.

16 The analysis was in fact previously supplemented. Watermaster and the parties worked
17 collaboratively to present their views regarding the economic benefits and burdens that were not
18 directly addressed in Dr. Sunding’s analysis. The process culminated in changes to the Peace II
19 Measures and broader satisfaction with the documentation. The fact that the parties are satisfied that
20 Dr. Sunding’s analysis was one opinion and not the last word and further have found a way to work
21 through their differences should be sufficient.

22 Page 34, footnote 40:

23 The Referee suggests that the Supplement to the OBMP Implementation Plan does not fully
24 reflect Section 5.2 of the Peace II Agreement. Section 5.2 of the Peace II Agreement says that the
25 OBMP Implementation Plan will be supplemented to reflect that WMWD, City of Ontario, and
26 Jurupa Community Services District will exercise good faith and reasonable best efforts to arrange
27 for the design, planning and construction of Future Desalters. The Supplement to the OBMP
28

1 Implementation Plan describes the efforts underway by these three entities to arrange for the design,
2 planning and construction of the Future Desalters. (Peace II Agreement, Attachment “D,” OBMP
3 Implementation Plan Supplement, p.8.)

4 Page 35, 13-15:

5 The Referee claims that the 2007 Supplement does not follow the provisions related to
6 recharge contained in the Peace II Agreement, referencing Article VIII of the Agreement. This is a
7 mysterious statement.

8 Section 8.1 of the Peace II Agreement specifies that the Recharge Master Plan will be
9 updated. (Peace II Agreement, § 8.1.) Page 4 of the 2007 Supplement says that the Recharge Master
10 Plan will be updated. (Peace II Agreement, Attachment “D,” OBMP Implementation Plan
11 Supplement, p. 8.) Section 8.2 of the Peace II Agreement describes coordination between the parties
12 regarding the update. (Peace II Agreement, § 8.2.) Page 4 of the 2007 Supplement describes the
13 same coordination. (Peace II Agreement, Attachment “D,” OBMP Implementation Plan Supplement,
14 p.8.) Section 8.3 of the Peace II Agreement is copied nearly verbatim into the 2007 Supplement
15 under the heading “Suspension” to the point where the 2007 Supplement contains a typographical
16 error in referencing a provision of the Peace II Agreement as located “above.” (Peace II Agreement,
17 § 8.3.) Section 8.4 of the Peace II Agreement discusses the 6,500 acre-feet of Supplemental Water
18 recharge as does the 2007 Supplement at pages 4-5. (Peace II Agreement, § 8.4; Peace II Agreement,
19 Attachment “D,” OBMP Implementation Plan Supplement, pp. 4-5.)

20 The 2007 Supplement also incorporates the provisions of the Judgment amendment relating
21 to Hydraulic Control and Basin Reoperation.

22 Page 35, lines 15-17:

23 The Referee says that the Court should not approve the 2007 Supplement until it is satisfied
24 that the Supplement accurately reflects the agreement of the parties. However, as the record reflects,
25 the documents embody the agreement of the parties, and the parties support approval of the
26 documents – this is the best evidence there is that the documents accurately reflect the agreement of
27 the parties.

28

1 In terms of a full explanation of the modifications to the Court, the 2007 Supplement does
2 not fundamentally modify the plan as set forth in 2000. Since 2000, Implementation of the OBMP
3 has moved from an anticipated set of actions, to actual on-the-ground implementation measures. The
4 most accurate manner for the 2007 Supplement to update the Implementation Plan is thus to indicate
5 what activities are actually underway, and to provide some indication of where they are going. In
6 addition to this, it is important that the Implementation Plan incorporate the concepts of Hydraulic
7 Control and Basin Reoperation as explicit OBMP goals. As described above, this was done under
8 Program Element 2 (pp. 3-8).

9 Page 36, footnote 42:

10 The Report states that Watermaster has not indicated which of the two schedules regarding
11 controlled overdraft have been chosen.⁸ The agreements themselves did not contemplate that the
12 parties would have chosen which schedule to use by the time of approval of the Peace II Documents.
13 Whichever schedule was to be chosen did not impact the Court's approval of the overall strategy.
14 However, just prior to the filing of Watermaster's Motion, the parties were able to commit to the
15 most rapid depletion schedule. Mr. Manning testified to this at the November 29 hearing. (November
16 29, 2007 Reporter's Transcript, 70:20-25.)

17 Page 36, footnote 43:

18 The Referee says that Watermaster accounting should be corrected back to 2000 to account
19 for shortfalls in storm water new yield and induced inflow. Notably, there is no recommendation to
20 correct for Mr. Wildermuth's opinion that Safe Yield has historically been greater than 140,000 acre-
21 feet. Watermaster appreciates the suggestion that corrections should be made where material – but
22 not only if they penalize the parties.

23 Page 38, lines 7-9:

24 The Referee demands an explanation of how the proposed Rules and Regulations
25 amendments are in the public interest, are consistent with the OBMP and are consistent with Article
26 X, section 2 of the California Constitution.

27
28 ⁸ This question is repeated at page 42, line 7-8.

1 The Rules and Regulations amendments primarily concern accounting practices by
2 Watermaster. While aspects of the Peace II documents are of great significance going to the heart of
3 the Judgment and Watermaster's role, some are more mundane. The Rules and Regulations
4 amendments are more in the nature of the latter category.

5 The Referee articulates 5 amendments to the Rules and Regulations. (Report, 37:8-18.) Four
6 of these concern internal Watermaster accounting practices. While the parties are interested in these
7 issues because they may impact the assessments that any individual party pays, they are not issues
8 that impact OBMP Implementation, and it is folly to engage in the hyperbolic exercise of linking
9 them to the general public interest or to the State Constitution. They impact the allocation of costs
10 amongst the parties, and here, as elsewhere, the agreement of the parties should be determinative that
11 the amendments are appropriate.

12 The amendment that does not concern mere accounting practices is the amendment
13 concerning storage losses. The Rules and Regulations require that Watermaster will charge losses of
14 2% unless technical analysis shows that a different amount will be justified. Watermaster's technical
15 analysis shows that once Hydraulic Control is achieved, there will be no losses to the Santa Ana
16 River. Thus, losses will be reduced to less than 1%. However, in the absence of the OBMP, losses
17 would be much higher – in the 6% range. Thus, any party storing water in the Chino Basin who has
18 not contributed to OBMP implementation will be charged losses of 6%. This encourages investment
19 in OBMP Implementation and so furthers the Physical Solution under the Judgment.

20 Page 38, lines 19-21:

21 The Referee notes that Watermaster's Motion did not indicate the actual quantity of water in
22 storage by the Non-Agricultural Pool as of June 20, 2007. This is true. However, it is unclear why
23 this is relevant to the Court's analysis. The amount of water held in storage was testified to by Mr.
24 Manning. (November 29, 2007 Reporter's Transcript, 70:3-13.)

25 Page 39, footnote 47:

26 The Referee suggests that Watermaster should not give up discretion to purchase the one
27 time transfer for Desalter replenishment. However, Watermaster prefers the holistic management
28

1 approach presented by the suite of actions contemplated by the Peace II Measures. Watermaster has
2 adequate tools to address Desalter replenishment in the near future.

3 Page 39, line 9:

4 The Referee says that there is no definition of “Early Termination” in the Purchase and Sale
5 Agreement. Early Termination is clearly defined by the terms of the paragraph for which it is the
6 heading. Early Termination occurs if Watermaster does not issue its Notice of Intent to Purchase in
7 accordance with Paragraph D of the agreement within twenty-four months of Court approval.

8 Page 41, lines 7-9:

9 The Referee wonders what Watermaster would do if it determines that additional desalter
10 capacity is necessary. The relevance of this question lies in the declaration in Article X of the Peace
11 II Agreement that the Peace Agreement commitments regarding future desalters has been met. The
12 commitment in the Peace Agreement and the OBMP was to construct 40,000 acre-feet of desalter
13 capacity. If the next increment of desalter capacity is constructed as planned, then this commitment
14 will be met.

15 The parties have committed to 40,000 acre-feet. If Watermaster determines that more is
16 needed in the future, then new commitments will be sought. But Watermaster intends to respect and
17 honor the commitments that have already been made.

18 The Referee also asks what Watermaster will do if WMWD reneges on its commitment.
19 Again, Watermaster respects the commitment WMWD has made with regard to the desalters.
20 WMWD who has already acted to approve the Peace II Measures, will lose \$5 million of available
21 funding if it does not proceed. (November 29, 2007 Reporter’s Transcript, 32:21-25, 33:1-2.)
22 However, if WMWD is unable to fulfill its commitment, then Watermaster will seek other
23 alternatives.

24 Page 41, lines 15-16:

25 The Referee asks whether Watermaster will commit to a schedule for submission of the
26 updated Recharge Master Plan for Court approval. Watermaster has just started the process of
27 updating the Recharge Master Plan. It is unclear exactly what will be involved with this effort.

28

1 However, Watermaster will likely again require commitment equal to the successful completion of
2 prior efforts. The outdate for a completion of an update to the Recharge Master Plan is already June
3 of 2010, just 30 months away.

4 Page 41, lines 24-26:

5 The Referee asks whether Watermaster intends to revisit the potential need for caps on
6 production if recharge capacity and the availability of replenishment water do not keep pace with
7 demand. Given the Referee's discussion in Part VI.A. about the "fundamental premise" of the
8 Judgment prohibiting caps on production, the Referee and indeed many parties may be skeptical as
9 to whether such caps are consistent with the Judgment or even prudent. It may be that the continued
10 integrity of the Physical Solution is inextricably intertwined with Watermaster and the parties'
11 ability to provide sufficient recharge capacity and replenishment opportunities to support continued
12 reliance on the Basin. The feasibility of this strategy will depend on physical conditions and
13 economics. What may be physically possible may be economically infeasible. However, as of this
14 writing, Watermaster has no opinion as to the outermost boundary of the replenishment possibility
15 and thus whether caps will be required. As always, Watermaster will hold the protection of the Basin
16 above all other considerations.

17 Page 41, line 28 to page 42, line 1:

18 The Referee asks why section 4.4 of the Peace II Agreement is necessary given the
19 availability of the assignment provision of Judgment Exhibit "G" paragraph 6(a). The assignment
20 provision only applies where an appropriator is providing water to an existing Non-Agricultural Pool
21 member in lieu of groundwater pumping. It does not account for the situation where an appropriator
22 itself owns overlying land and pumps water for an overlying use on that land.

23 Page 42, lines 7-10

24 The Referee asks whether Watermaster intends to revise its schedule of controlled overdraft
25 as new information is obtained. At the November 29, 2007 hearing, Mr. Manning answered this
26 question in the affirmative. (November 29, 2007 Reporter's Transcript, 71:1-6.)

27 Page 43, line 22; Page 44, lines 4-6:

28

1 Watermaster’s Motion does not indicate that any evaluation has occurred of the need for
2 further limits on water held in storage. There has been no articulation of the trade offs between
3 increasing local storage versus the storage and recovery program, and Watermaster has not revisited
4 the issue of water being held in Local Storage accounts rather than being put to beneficial use.
5 Mr. Manning Testified to the benefits of increasing the ability of the parties to utilize Local Storage.
6 Local storage is a natural strategy based upon the increasing demands on the system in light of the
7 issues facing the State Water Project. (November 29, 2007 Reporter’s Transcript, 69:20-70:2.)
8 Page 45, lines 11-12, lines 22-55; Page 47-48:

9 The Report can be read as inferring that Wildermuth modified its model assumptions
10 inappropriately in order to make its baseline condition work properly. The Report suggests that
11 recharge capacity was simply “nudged up” for this purpose. However, as noted in other locations
12 throughout the Referee’s Report the recharge capacity used in the model is 61,000 acre-feet per year
13 through 2008/09, 90,000 acre-feet per year 2009/10 through 2018, and then 104,000 acre-feet per
14 year 2019/20 through 2060/61. (See Report, 55:3-56:1.) These are legitimate expectations
15 concerning the development of recharge capacity. Recharge capacity was not simply “nudged up.”

16 The Baseline Alternative “capped” production at 188,500 acre-feet. The Referee attempts to
17 characterize this as the “elephant in the room.” (Report, 44:11.) The Referee also contends that the
18 parties have not yet agreed to increasing recharge capacity as an alternative to capping production.
19 Every alternative considered by Wildermuth rests on the arbitrary capping of production. A cap on
20 production is contrary to the “fundamental premise” of the Judgment. Thus, every alternative
21 violates the Judgment.

22 All of the above issues are presented as fundamental issues that challenge Watermaster’s
23 technical analysis of Basin Reoperation. What the Report glosses over, however, is that these are
24 issues that plague the formulation of the *Baseline Alternative*. That is, the issue of production
25 potentially exceeding Watermaster’s ability to replenish is an issue that exists whether or not
26 Watermaster’s Motion is approved.

1 For the purpose of the technical analysis of Basin Reoperation, Mr. Wildermuth however was
2 forced to instruct the model to respond to this issue in some manner. The method he chose was to
3 assume a cap on production. This does not mean that this would be the choice that Watermaster and
4 the parties would make if this problem arose as a real problem sometime in the future – it was
5 simply a necessary assumption in order to allow the model to perform the analysis that is germane to
6 the current issues in front of the Court.

7 Basin Reoperation and Hydraulic Control do not create the problem of production potentially
8 exceeding the ability to replenish. Because of the induced inflow that is caused by these strategies,
9 however, they may help to mitigate the problem. It may be tempting for the Court to think it
10 expedient to use the current approval process as a means to “leverage” the parties to solve problems
11 that are not raised by Watermaster’s Motion, and while it appears that this is the course favored by
12 some, Watermaster respectfully requests the Court to confine its review to its judicial function of
13 deciding the controversy in front of it, and not stray into thinking that it should attempt to solve all
14 problems now.

15
16 Page 49-50:

17 The Referee notes that Watermaster’s Motion does not account for the projected decline in
18 Safe Yield. This issue is closely connected to the issue of the Wildermuth modeling assumption of a
19 limitation on production. Safe Yield is projected to decline for reasons that are completely unrelated
20 to the Peace II measures. The information is new to Watermaster and not relevant to Watermaster’s
21 Motion. The short answer is that the condition is associated with the “Baseline condition” and is
22 improved by the Court’s approval of the Peace II Measures.

23 Watermaster’s Motion, and the Peace II measures generally, are a complicated and
24 substantial attempt to solve the most pressing set of issues currently facing the Basin – how to move
25 forward with the next increment of desalting capacity and achieve Hydraulic Control as required by
26 the basin Plan amendments. Just as the Peace Agreement left future issues to be resolved in the
27
28

1 future, so now does Peace II leave some issues to be addressed with the Court's guidance in the
2 years ahead.

3 Page 55-56:

4 The Referee contends that the Technical Report has not considered how changes in recharge
5 patterns will impact Hydraulic Control. The Referee questions the ability to recharge and related
6 recharge effects to Hydraulic Control. (Report, 56:6-10.) Watermaster replenishes in arrears for
7 overproduction, or after "takes". Therefore water levels have been drawn down prior to
8 replenishment assisting in maintaining Hydraulic Control and then replenishment occurs. If, as the
9 Special Referee proposes, more recharge capacity is made available and less frequent much larger
10 recharge volumes occur, Hydraulic Control would actually benefit not be hindered.

11 Page 56, lines 13-16:

12 The Referee recommends that Watermaster should perform the complete technical
13 assessment to explain the relationships between recharge capacity, replenishment volumes, safe
14 yield, maintaining hydraulic Control, groundwater production and groundwater levels. However,
15 Watermaster rejects the notion that Watermaster must perfect its understanding of the Basin
16 completely before it moves forward with any substantial management of the Basin. If the Court
17 requires further refinement beyond that which has been provided, there is no reason why approval of
18 the Peace II Measures should be delayed with the Court receiving further updates on desired
19 information as it is made available.

20 Pages 57-60:

21 The Referee assumes that Hydraulic Control will limit storage opportunities and criticizes the
22 Motion for not acknowledging this. The Referee says that Watermaster must consider trade offs with
23 limiting availability of storage and impact on OBMP and Judgment. However, there is no trade off
24 with storage. In fact, as observed by Mr. Wildermuth, without Hydraulic Control it is not possible to
25 do large scale storage programs because without Hydraulic Control there would be adverse impacts
26 on the River. (November 29, 2007 Reporter's Transcript, 126:18-23.) Watermaster will have to
27 prudently structure its Storage and Recovery proposals to with Hydraulic Control in mind.

28

1 Furthermore, without Hydraulic Control there will be no access to the assimilative capacity created
2 by the Maximum Benefit Standards. In other words, the parties would be expending large sums of
3 money to construct treatment facilities for very little benefit. (November 29, 2007 Reporter's
4 Transcript, 93:15-17.)

5 Page 57: 5-6:

6 The Report says that 400,000 acre-feet of storage programs are under consideration. This is
7 incorrect. The quoted language clearly refers to increasing Dry Year Yield storage from the existing
8 100,000 acre-feet up to 300,000 acre-feet.

9 Page 70:

10 The Referee recommends that: "If there are practical alternatives for recycled water use that
11 do not result in basin overdraft and do not change the entire gradient of the basin, and possibly
12 maintain safe yield and allow additional storage and recovery programs, those alternatives should be
13 identified and evaluated. The economics of recycled water use and recharge arguably should not be
14 of *paramount* importance to Watermaster . . ." (Report, 70:22-26.)

15 This recommendation appears to be based on assumptions not supported by the evidence. As
16 explained above, the alternative presented in the Peace II documents does *not* decrease safe yield,
17 and does *not* interfere with additional storage and recovery programs. In fact, as Mr. Wildermuth
18 testified, it is only with Hydraulic Control that storage and recovery programs as envisioned by the
19 OBMP as even possible. (November 29, 2007 Reporter's Transcript, 126:18-23.)

20
21 **VII. Conclusion**

22 The Referee's Preliminary Report pervasively minimizes economic considerations and party
23 support in its evaluation of the Peace II Measures. The parties to the Judgment do not have unlimited
24 financial resources. Proactively, the parties seek to implement proactive measures ahead of schedule
25 in anticipation of potential regional and statewide water shortages and drought.

1 As noted by the Court at the August 27, 2007 hearing, the ability of the parties in the Chino
2 Basin to craft solutions that achieve the consensus of the many diverse interests in the Basin is one
3 of the chief virtues of the Watermaster process after the Peace Agreement. These parties are diverse:
4 some are private, some are public, some use the Basin as a water supply, others (such as the Chino
5 Basin Water Conservation District) are charged only with maintaining the health of the Basin. They
6 have both similar and divergent water supply and water management challenges. However, they are
7 bound together by a common goal: the implementation of the OBMP. And, it is their diversity of
8 identity and interests which acts as a safeguard against the "Tragedy of the Commons" that is of
9 concern to the Court.

10 While the governance model and processes that are "Watermaster" may be difficult for the
11 outsider to appreciate, under the continuing supervision of the Court, the model has effectuated
12 unprecedented change for the benefit of the Basin, the parties, the region and the state.

13 Far from contributing to an exploitation of resources, Watermaster has led both consensus
14 building and action. Rare are the circumstances where a party, let alone a region can embrace the
15 wide-spectrum of management activities embodied in the OBMP – without opposition – from any
16 significant stakeholder. There is simply no modern parallel.

17 For all these reasons, the Chino Basin Watermaster respectfully requests that this Court
18 acknowledge the tremendous effort expended by the parties to develop consensus, embrace the
19 offered concepts for improving the over-all efficiency of basin management, self-reliance and the
20 reduced importation of supplemental water. We ask the Court to approve the Peace II Documents
21 now before further delays contribute to a closing of the present window of opportunity.

22
23
24 Dated: December 14, 2007



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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 December 14, 2007 I served the following:

1) WATERMASTER RESPONSE TO 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

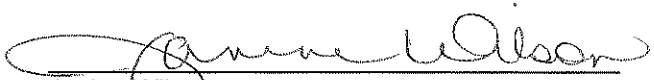
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on December 14, 2007 in Rancho Cucamonga, California.


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