

FEE EXEMPT

1 Jimmy L. Gutierrez (SBN 59448)
2 GUTIERREZ, FIERRO & ERICKSON, A.P.C.
3 12616 Central Avenue
4 Chino, California 91710
5 Telephone: (909) 591-6336
6 Facsimile: (909) 628-9803

7 Attorneys for Defendant, City of Chino

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

10
11 CHINO BASIN MUNICIPAL WATER
12 DISTRICT,

13 Plaintiff,

14 v.

15 CITY OF CHINO, et al.,

16 Defendants.

CASE NUMBER: RCV 51010
[Assigned for All Purposes to Honorable
Stanford E. Reichert, Dept. R6]

**CITY OF CHINO'S REPLY TO
WATERMASTER'S RESPONSE
TO ORDER FOR ADDITIONAL
BRIEFING**

Date: May 6, 2016
Time: 1:30 p.m.
Dept.: R6

(FEE- EXEMPT PURSUANT TO GOVERNMENT
CODE § 6103)

21
22 The City of Chino (hereafter "Chino") submits this reply to Watermaster's Response to
23 Order for Additional Briefing dated April 1, 2016.

Watermaster Response to Question 1

Does Desalter-induced recharge physically occur?

Is it an accounting concept?

Is it something more, less or additional?

Watermaster answers affirmatively that River Water enters the Chino Basin.

However, Watermaster's response ends with a statement to support its attempt to equate "Desalter-induced recharge" and "New Yield." Watermaster's conclusory statement reads as follows:

Accordingly, Desalter-induced recharge has been categorized by Agreements and Court Orders as New Yield."

The conclusory statement is wrong. None of the agreements or court orders referenced by Watermaster in Footnotes 1-4 equate the terms. In fact, they do not equate the terms.

Of course, Watermaster's purpose of equating the terms is clear. By using "Desalter-induced recharge" instead of "New Yield," Watermaster argues that Paragraph 6.2(a)(iii) and 7.1 of Peace II, that permit the use of New Yield as a credit to offset Desalter Production, also permit the use of "Desalter-induced recharge" as a credit to offset Desalter Production.

Footnote 1 refers to Exhibit 2 entitled "POST-ORDER MEMORANDUM" but it is not a court order. It is a brief submitted by Watermaster Counsel Scott S. Slater who explains its purpose as follows:

This memorandum would then serve to create a historical record concerning the rationale and justification for the changes to assist in future interpretation and construction of the Judgment and OBMP. [Page 2, Lines 16-18, Exhibit 2].

The present memorandum contains Watermaster's responses to the questions raised by the Referee that are pertinent to the proposed amendments to the Judgment. [Page 3, Lines 1-3, Exhibit 2].

Exhibit 2 does not change the meaning of New Yield and it does not categorize or equate New Yield as Desalter-induced recharge, a term that was not used.

1 In Footnote 1, Watermaster quotes from Exhibit 2 at Section B.2 about “why Desalter
2 operations are a component of New Yield” but the full response is:

3 *Desalter operations do not necessarily add to New Yield. However, it is*
4 *possible if not probable, that the Desalters will serve to induce some new or*
5 *additional Recharge beyond the quantities achieved in the present historical*
6 *record. To the extent the location and operation of the Desalters is proven to*
7 *serve as an effective management tool to improve Recharge and add to the*
8 *yield of the Basin, it may thereby constitute “New Yield.”*

9 [Page 12, Lines 13-18].

10 In addition, Exhibit 2 states that the definitions introduced by the Peace Agreement,
11 like New Yield, were not intended to conflict with any definition in the Judgment. [Page 17,
12 Lines 15-16, Exhibit 2].

13 In Footnote 2, Watermaster quotes from Exhibit 3. Again, it does not change the
14 meaning of New Yield and it does not categorize or equate New Yield as Desalter-induced
15 recharge, a term that was not used.

16 Watermaster also states: “Desalter-induced recharge is a real, physical, measureable
17 occurrence” and refers to Footnote 3, but it lacks factual or scientific support. Watermaster
18 merely argues that Peace II identifies Desalter-induced recharge “as an example of New Yield
19 attributable to the Desalters.”

20 Finally, in Footnote 4, Watermaster refers to Exhibits 4, 5 and 6 as support for its
21 statement that Desalter-induced recharge has been categorized as New Yield. However, those
22 Exhibits do not.

- 23 • Exhibit 4 [Order Concerning Adoption of OBMP July 13, 2000] does not even mention
24 those terms. It orders compliance with Peace I and the OBMP.
- 25 • Exhibit 5 [Notice of Entry of Order Concerning Nine-Member Board and Order
26 Concerning Motion to Amend Judgment September 29, 2000] does not mention the
27 terms. Furthermore, the first order confirms that there are no provisions in the Peace
28 Agreement that ensure the Desalters will be built. [Page 5, Lines 1-2].

- 1 • Exhibit 6 [Special Referee Report and Recommendations Regarding Watermaster's
2 Motion to Amend Judgment September 14, 2000] does not support Watermaster.
3 Referee Schneider does not use Desalter-induced recharge and she does not equate
4 New Yield with River Water – let alone Desalter-induced recharge.
5

6 However, the fundamental flaw in Watermaster's answer is that it equates Desalter-
7 induced recharge with New Yield in word only.
8

9 **Watermaster Response to Question 2.1**

10 **How did the parties arrive at the figure of 50% of the total Desalter Production**
11 **(up to a maximum of 20,000 AFY of recharge) to be deemed induced recharge?**
12

13 Watermaster explains that the 50% figure came from Exhibit 7 (through Footnotes 5, 7
14 and 8), which assumed that Santa Ana River water would be half of the Desalter Production.
15 Watermaster also refers to the far right column of Exhibit 1 (Table 7-10 of the 2013 WEI
16 Report revealed in November 2015 with the Watermaster Motion).

17 Watermaster states that it estimated the quantity of Desalter-induced recharged from
18 the Santa Ana River attributable to the desalters and that the estimate is required by Paragraph
19 7.1 of Peace II. It is not. Instead, Paragraph 7.1 of Peace II permits the Watermaster Board to
20 make annual findings about the quantity of New Yield.

21 It is also important to emphasize that Watermaster's Response does not state that the
22 Watermaster Board has made any finding of New Yield under Paragraph 7.1 of Peace II.

23 In fact, the record shows that the Watermaster Board formally has taken the position
24 that there is no New Yield due to any Santa Ana River Underflow in its Annual Assessment
25 Packages. [See Appendix B to Exhibit A attached to the Declaration of Dave Crosley dated
26 January 19, 2016 in Support of Chino's Opposition to Watermaster's Motion].
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Watermaster Response to Question 2.2

Why should Watermaster reduce Safe Yield by that amount each year?

Watermaster does not answer the court's question. Instead, Watermaster denies the clear command of SYRA Paragraph 5.2(b) to reduce Safe Yield. Watermaster also fails to provide any legal justification for its intention to reduce Safe Yield by treating Safe Yield as a new source of water to offset the Desalter Production. Watermaster does not contradict Chino's legal showing that Safe Yield is not available to offset the Desalter Production under the Peace Agreements and that such use of Safe Yield is prohibited by the Judgment.¹

Watermaster begins its response to the Court by repeating its claim that Desalter-induced recharge has been defined as New Yield as the premise for Watermaster's assertion that it is not going to reduce Safe Yield.

Then, Watermaster denies that it will reduce Safe Yield. Its assertion reads:

Watermaster does not actually reduce Safe Yield by the amount of Desalter-induced recharge; [Page 3, Line 11]

But, its assertion cannot stand. Its assertion is contradicted by the explicit language of SYRA Paragraph 5.2(b) that commands Watermaster to reduce the Safe Yield. That language states:

During each applicable production year, Watermaster shall reduce Safe Yield by an amount equal to fifty [50] percent of the total Desalter Production, up to a maximum of twenty-thousand AFY . . .

[Page 15, SYRA]

Watermaster attempts to explain its assertion by stating:

Rather, as a type of New Yield, Desalter-induced recharge is separately accounted for and apportioned according to the Peace II Agreement.

But here, Watermaster actually backs away from its prior claim that Desalter-induced recharge is the same as New Yield by referring to Desalter-induced recharge "as a type of

¹ *Hi-Desert County Water District v. Blue Skies County Club, Inc.* (1994) 23 Cal.App.4th 1723.

1 *New Yield.*” Therefore, Watermaster acknowledges that Desalter-induced recharge is not the
2 same as New Yield – it is “*a type of New Yield.*”

3 What “*type of New Yield*” is Desalter-induced recharge that can allow Watermaster to
4 separately account for it and apportion it under Peace II? Under Peace II, only New Yield
5 may be so treated. Peace II does not allow such treatment for a “*type of New Yield*” and
6 certainly not for Desalter-induced recharge.

7 Peace II directs an accounting for New Yield. Peace II does not direct an accounting
8 for a portion of existing Safe Yield such as one labelled “Desalter-induced recharge.” The
9 terms reflect different concepts. New Yield is water from all sources including River Water
10 that increase the yield of the basin over what it was in 2000. Peace II also requires
11 Watermaster to make such a finding based upon scientific data; but Watermaster has not made
12 it and Watermaster does not propose to make it. To the contrary, Watermaster seeks to amend
13 the command of Peace II by substituting “New Yield” with “Desalter-induced recharge” and
14 by avoiding the required factual determination.

15 Watermaster seeks this new direction by requesting the Court’s approval of SYRA
16 Paragraph 5.2(b). Under SYRA Paragraph 5.2(b), Watermaster would be directed to: (i)
17 account for Desalter-induced recharge as being equal to 50% of the Desalter Production, (ii)
18 reduce Safe Yield by an equivalent amount, (iii) supplement the amount of the reduction in
19 the Safe Yield from the unproduced Agricultural pool water and (iv) reduce the unproduced
20 Agricultural Pool water by a like amount.

21 Stated differently, Watermaster argues that “Desalter-induced recharge is “*a type of*
22 *New Yield*” other than Safe Yield, which will not reduce Safe Yield. It says this is necessary
23 to avoid double counting the same water being recharged into the basin. To do so, there must
24 be New Yield in order to avoid reducing Safe Yield. However, Watermaster does not show
25 the existence of New Yield nor the data that proves New Yield required by Paragraph 1.1(aa)
26 of Peace I.² Furthermore, Table 7-10 [Watermaster Exhibit 1] does not show that the
27
28

² “New Yield” means proven increases in yield in quantities greater than historical amounts from sources of supply . . .

1 quantities under the "New Yield" column were not used to support the basin's total recharge
2 amount, which Watermaster's engineer says is approximately 135,000 AF. For this reason, it
3 is likely that Watermaster's engineer has double counted the water recharging the basin; and,
4 if there is any doubt, discovery should be permitted.

5 In essence, Watermaster tries to make this new direction look like the direction in
6 Peace II. But the two directions are different, because SYRA Paragraph 5.2(b) directs
7 Watermaster to take Safe Yield to offset the Desalter Production rather than real New Yield
8 for the offset. The fact that SYRA Paragraph 5.2(b) directs the taking of Safe Yield proves
9 that there is no New Yield for the offset. If there were real New Yield, Watermaster would
10 not need to take Safe Yield to offset the Desalter Production.

11 Watermaster has not answered the Court's question.

12 The Court should construe Watermaster's response as an acknowledgment that Safe
13 Yield should not be reduced to offset the Desalter Production.

14 Watermaster's response should be understood to mean that Watermaster wants to take
15 "Desalter-induced recharge" as a type of New Yield to offset the Desalter Production.
16 However, there is no real New Yield. If there were any, Watermaster would not be asking to
17 take Safe Yield to offset the Desalter Production.

18 19 Watermaster Response to Question 3

20 **How does a reduction in Safe Yield affect Operating Safe Yield?**

21
22 Watermaster's response to this question carries the implication that a reduction of the
23 unproduced Agricultural Pool water occasioned by a reduction in the Safe Yield impacts all
24 appropriators equally. It does not.

25 The reduction of the amount of unproduced Agricultural Pool water specially impacts
26 the five appropriators that have land use conversion claims; but not the other appropriators.

27 In the "Chino Basin Watermaster 2014/15 Assessment Package," the land use
28 conversion claims of Chino and JCSD totaled 21,499 AF – or 85% of all such claims. The

1 Assessment Package reveals that there were 49,161 AF of unproduced Agricultural water
2 from which Chino and JCSD receive water toward their land use conversion claims. Under
3 the current proposal, the 49,161 AF amount will be reduced to 24,161 AF due to the requested
4 25,000 AF reduction in the Safe Yield.

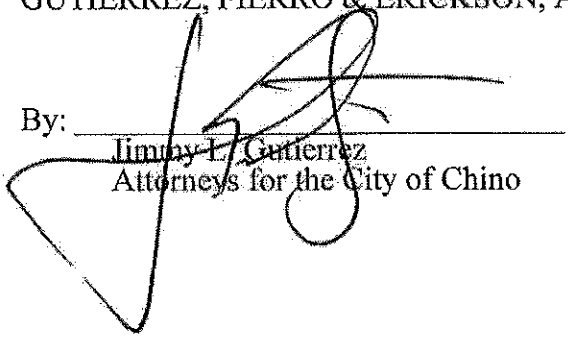
5 Of course, the reduction in the Safe Yield reduces the Operating Safe Yield by a like
6 amount but the reduction is restored from the 49,161 AF of unproduced Agricultural water.
7 Therefore, no Appropriator will suffer a reduction of its share of Operating Safe Yield.

8 However, the reduction of the unproduced Agricultural water from 49,161 to 24,161
9 will not impact appropriators equally. The appropriators that do not serve land converted
10 from agricultural to urban uses do not have land use conversion claims and will not suffer any
11 loss of water from the reduction of the unproduced Agricultural water. However, Chino and
12 JCSD that serve large areas of land converted from agricultural to urban uses have very large
13 land use conversion claims but they will not receive the water needed to serve the converted
14 agricultural land as envisioned by Exhibit H to the Judgment.

15
16 Respectfully submitted.

17
18 Dated: April 11, 2016

GUTIERREZ, FIERRO & ERICKSON, APC

19
20 By: 
21 Jimmy L. Gutierrez
22 Attorneys for the City of Chino
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CHINO BASIN WATERMASTER
Case No. RCV 51010
Chino Basin Municipal Water District v. The City of Chino

PROOF OF SERVICE

I declare that:

I am employed in the County of San Bernardino, California. I am over the age of 18 years and not a party to the within action. My business address is Chino Basin Watermaster, 9641 San Bernardino Road, Rancho Cucamonga, California 91730; telephone (909) 484-3888.

On April 11, 2016 I served the following:

1. CITY OF CHINO'S REPLY TO WATERMASTER'S RESPONSE TO ORDER FOR ADDITIONAL BRIEFING

☒ / BY MAIL: in said cause, by placing a true copy thereof enclosed with postage thereon fully prepaid, for delivery by United States Postal Service mail at Rancho Cucamonga, California, addresses as follows:

See attached service list: Mailing List 1

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

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

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

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

Executed on April 11, 2016 in Rancho Cucamonga, California.



By: Janine Wilson
Chino Basin Watermaster

BRIAN GEYE
AUTO CLUB SPEEDWAY
9300 CHERRY AVE
FONTANA, CA 92335

BOB KUHN
THREE VALLEYS MWD
669 HUNTERS TRAIL
GLENORA, CA 91740

ROBERT BOWCOCK
INTEGRATED RESOURCES MGMNT
405 N. INDIAN HILL BLVD
CLAREMONT, CA 91711-4724

STEVE ELIE
IEUA
3674 WHIRLAWAY LANE
CHINO HILLS, CA 91709

TOM THOMAS
CITY OF UPLAND
353 EMERSON STREET
UPLAND, CA 91784

PAUL HOFER
11248 S TURNER AVE
ONTARIO, CA 91761

DON GALLEANO
WMWD
4220 WINEVILLE ROAD
MIRA LOMA, CA 91752

JIM BOWMAN
COUNCIL MEMBER, CITY OF ONTARIO
303 EAST B STREET
ONTARIO, CA 91764

JAMES CURATALO
CUCAMONGA VALLEY WATER DIST
PO BOX 638
RANCHO CUCAMONGA, CA 91729

JEFF PIERSON
PO BOX 1440
LONG BEACH, CA 90801-1440

ALLEN HUBSCH
HOGAN LOVELLS US LLP
1999 AVENUE OF THE STARS
SUITE 100
LOS ANGELES, CA 90067

BOB FEENSTRA
2720 SPRINGFIELD ST,
ORANGE, CA 92867

Members:

Allen W. Hubsch	allen.hubsch@hoganlovells.com
Andrew Gagen	agagen@kidmanlaw.com
Andrew Lazenby	lazenbyag@bv.com
Arthur Kidman	akidman@kidmanlaw.com
Catharine Irvine	cirvine@DowneyBrand.com
Chris Swanberg	chris.swanberg@corr.ca.gov
Dan McKinney	dmckinney@douglascountylaw.com
David Aladjem	daladjem@downeybrand.com
Eddy Beltran	ebeltran@kidmanlaw.com
Fred Fudacz	ffudacz@nossaman.com
Jean Cihigoyenetché	Jean_CGC@hotmail.com
Jerry Eagans	geagans@redwineandsherrill.com
Jill Willis	jnwillis@bbklaw.com
Jim Markman	jmarkman@rwglaw.com
jimmy@city-attorney.com	jimmy@city-attorney.com
Joel Kuperberg	jkuperberg@rutan.com
John Harper	jharper@harperburns.com
John Schatz	jschatz13@cox.net
Joseph S. Aklufi	AandWLaw@aol.com
Kimberly Hall Barlow	khhb@jones-mayer.com
Mark D. Hensley	mhensley@hensleylawgroup.com
Martin Cihigoyenetché	martinc@cgclaw.com
Michelle Staples	mstaples@jdtplaw.com
Nick Jacobs	njacobs@somachlaw.com
Paeter E. Garcia	paeter.garcia@bbklaw.com
Paige H. Gosney	pgosney@jdtplaw.com
Randy Visser	RVisser@sheppardmullin.com
Robert E. Donlan	red@eslawfirm.com
Rodney Baker	rodbaker03@yahoo.com
Steve Kennedy	skennedy@bmklawplc.com
Tarquin Preziosi	tp@jones-mayer.com
Timothy Ryan	tjryan@sgvwater.com
Tom Bunn	TomBunn@Lagerlof.com
Tom McPeters	THMcP@aol.com
Tracy J. Egoscue	tracy@egoscuelaw.com
Trish Geren	tgeren@sheppardmullin.com
William J Brunick	bbrunick@bmblawoffice.com

Members:

Agnes Cheng	agnes.cheng@cc.sbcounty.gov
Al Lopez	lopezsixto@netzero.net
Alfonso Ruiz Jr.	Alfonso.Ruiz@gerdau.com
Andrew Silva	Andrew.Silva@cao.sbcounty.gov
Andy Campbell	acampbell@ieua.org
Andy Malone	amalone@weewater.com
Anna Truong	ATruong@cbwm.org
Annette Gonzales	agonzales@ci.ontario.ca.us
Anthony Beckham	beckham@waterexchange.com
April Robitaille	arobitaille@bhfs.com
April Woodruff	awoodruff@ieua.org
Arnold "AJ" Gerber	agerber@parks.sbcounty.gov
Arnold Rodriguez	jarodriguez@sarwc.com
Art Bennett	citycouncil@chinohills.org
Ashok Dhingra	ash@akdconsulting.com
Ben Lewis	benjamin.lewis@gswater.com
Ben Peralta	bperalta@tvmwd.com
Bill Leever	WLeever@ieua.org
Bill Thompson	bthompson@ci.norco.ca.us
Bob Bowcock	bbowcock@irmwater.com
Bob Feenstra	bobfeenstra@gmail.com
Bob Kuhn	bgkuhn@aol.com
Bob Kuhn	bkuhn@tvmwd.com
Bob Page	bpage@cao.sbcounty.gov
Brad Herrema	bherrema@bhfs.com
Brandon Howard	brahoward@niagarawater.com
Brenda Fowler	balee@fontanawater.com
Brenda Trujillo	brendatrujillo@chinohills.org
Brent Yamasaki	byamasaki@mw2dh.com
Brian Geye	bgeye@autoclubspeedway.com
Brian Hess	bhess@niagarawater.com
Carol Bennett	cbennett@tkeengineering.com
Carol Boyd	Carol.Boyd@doj.ca.gov
Carolina Sanchez	csanchez@weewater.com
Casey Costa	ccosta@chinodesalter.org
Chad Blais	cblais@ci.norco.ca.us
Charles Field	cdfield@att.net
Charles Linder	Charles.Linder@nrgenergy.com
Charles Moorrees	cmoorrees@sawaterco.com
Chino Hills City Council	citycouncil@chinohills.org
Chris Berch	CBerch@ieua.org
Chuck Hays	chays@fontana.org
Cindy Cisneros	cindyc@cvwdwater.com
Cindy LaCamera	clacamera@mw2dh.com
Cindy Li	Cindy.li@waterboards.ca.gov
Craig Miller	CMiller@wmwd.com
Craig Stewart	Craig.Stewart@amec.com
Cris Fealy	cifealy@fontanawater.com
Curtis Paxton	cpaxton@chinodesalter.org
Curtis Stubbings	Curtis_Stubbings@praxair.com
Dan Arrighi	darrighi@sgvwater.com
Dana Porche	dporche@cbwcd.org
Danielle Soto	danielle_soto@CI.POMONA.CA.US
Darron Poulsen	darron_poulsen@ci.pomona.ca.us
Daryl Grigsby	daryl_grigsby@ci.pomona.ca.us
Dave Argo	daveargo46@icloud.com
Dave Crosley	DCrosley@cityofchino.org
David D DeJesus	tvmwddiv2rep@gmail.com
David De Jesus	ddejesus@tvmwd.com
David Huskey	David.Huskey@cdcr.ca.gov
David Lovell	dlovell@dpw.sbcounty.gov
David Penrice	dpenrice@acmwater.com

David Ringel
David Starnes
Dennis Dooley
Dennis Mejia
Dennis Poulsen
Dennis Williams
Diana Frederick
Don Cutler
Don Galleano
Earl Elrod
Eric Fordham
Eric Garner
Eric Leuze
Erika Clement
Eunice Ulloa
Frank Brommenschkel
Frank LoGuidice
Frank Yoo
Gabby Garcia
Gailyn Watson
Gene Koopman
Geoffrey Kamansky
Geoffrey Vanden Heuvel
Gerald Yahr
Giannina Espinoza
Gloria Rivera
Grace Cabrera
Greg Woodside
Henry DeHaan
James Curatalo
James Jenkins
James McKenzie
Jane Anderson
Janine Wilson
Jasmin A. Hall
Jason Marseilles
Jason Pivovarov
Jean Perry
Jeanina M. Romero
Jeannette Vagnozzi
Jeffrey Bruny
Jeffrey L. Pierson
Jesse White
Jesus Placentia
Jill Willis
Jim Bowman
Jim Taylor
Jo Lynne Russo-Pereyra
Joe Graziano
Joe Grindstaff
Joe Joswiak
Joe P. LeClaire
Joel Ignacio
John Abusham
John Bosler
John Huitsing
John Lopez and Nathan Cole
John V. Rossi
Jon Lambeck
Jose Alire
Jose Galindo
Josh Swift
Julie Cavender
Julie Saba

david.j.ringel@us.mwhglobal.com
david.starnes@mcmcn.net
ddooley@angelica.com
dmejia@ci.ontario.ca.us
dpoulsen@californiasteel.com
dwilliams@geoscience-water.com
diana.frederick@cdcr.ca.gov
dcutler@jcsd.us
donald@galleanowinery.com
earl.elrod@verizon.net
eric_fordham@geopentech.com
eric.garner@bbklaw.com
Eric.Leuze@nrgenergy.com
Erika.clement@sce.com
eulloa@cbwcd.org
frank.brommen@verizon.net
faloguidice@sgvwater.com
FrankY@cbwm.org
ggarcia@mvwd.org
gwatson@airports.sbcounty.gov
GTKoopman@aol.com
gkamansky@niagarawater.com
GeoffreyVH@juno.com
yahrj@koll.com
gia.espinoza@gerdau.com
gloriar@cvwdwater.com
grace_cabrera@ci.pomona.ca.us
gwoodside@ocwd.com
hpdehaan@verizon.net
jamesc@cvwdwater.com
cnomgr@airports.sbcounty.gov
jmckenzie@dpw.sbcounty.gov
janderson@jcsd.us
JWilson@cbwm.org
jhall@ieua.org
jmarseilles@ieua.org
jpivovarov@ieua.org
JPerry@wmwd.com
jromero@ci.ontario.ca.us
jvagnozzi@ci.upland.ca.us
jeffrey.bruny@NOV.com
jpierson@intexcorp.com
jesse.white@gerdau.com
jplasencia@cityofchino.org
jnwillis@bbklaw.com
jbowman@ci.ontario.ca.us
jim_taylor@ci.pomona.ca.us
jolynner@cvwdwater.com
jgraz4077@aol.com
jgrindstaff@ieua.org
JJoswiak@cbwm.org
leclairj@cdmsmith.com
jignacio@ieua.org
john.abusham@nrg.com
johnb@cvwdwater.com
johnhuitsing@gmail.com
customerservice@sarwc.com
jrossi@wmwd.com
jlambeck@mwdh2o.com
jalire@cityofchino.org
jose_a_galindo@praxair.com
jmswift@fontanawater.com
julie.cavender@cdcr.ca.gov
jsaba@jcsd.us

Justin Brokaw	jbrokaw@hughes.net
Justin Nakano	JNakano@cbwm.org
Justin Scott Coe	jscottcoe@mvwd.org
Karen Johnson	kejwater@aol.com
Kathleen Brundage	kathleen.brundage@californiasteel.com
Kathy Kunysz	kkunysz@mw2dh.com
Kathy Tiegs	Kathyt@cvwdwater.com
Keith Person	keith.person@waterboards.ca.gov
Kelly Berry	KBerry@sawpa.org
Ken Jeske	kjeske1@gmail.com
Ken Waring	kwaring@jcsd.us
Kevin Blakeslee	kblakeslee@dpw.sbcounty.gov
Kevin Sage	Ksage@IRMwater.com
Kurt Berchtold	kberchtold@waterboards.ca.gov
Kyle Snay	kylesnay@gswater.com
Landon Kern	lkern@cityofchino.org
Laura Mantilla	lmantilla@ieua.org
Lawrence Dimock	lawrence.dimock@cdcr.ca.gov
Lee Moore	Lee.Moore@nrgenergy.com
Linda Jadeski	ljadeski@wvwd.org
Linda Minky	LMinky@BHFS.com
Lisa Hamilton	lisa.hamilton@amecfw.com
Lisa Leabo	lleabo@cbwm.org
Lisa Lemoine	LLemoine@wvwd.com
Marco Tule	marco.tule@nrg.com
Maribel Sosa	Maribel_Sosa@ci.pomona.ca.us
Mark Wiley	mwiley@chinohills.org
Marsha Westropp	MWestropp@ocwd.com
Martin Zvirbulis	martinz@cvwdwater.com
Mathew C. Ballantyne	mballantyne@cityofchino.org
Matthew H. Litchfield	mlitchfield@wvwd.org
Michael Sigsbee	msigsbee@ci.ontario.ca.us
Mike Maestas	mikem@cvwdwater.com

Members:

Maria Flores	mflores@ieua.org
Maria Mendoza-Tellez	MMendoza@weewater.com
Marilyn Levin	marilyn.levin@doj.ca.gov
Mario Garcia	mgarcia@tvmwd.com
Mark Kinsey	mkinsey@mwwd.org
Mark Wildermuth	mwildermuth@weewater.com
Marla Doyle	marla_doyle@ci.pomona.ca.us
Martha Davis	mdavis@ieua.org
Martin Rauch	martin@rauchcc.com
Meg McWade	meg_mcwade@ci.pomona.ca.us
Melanie Otero	melanie_otero@ci.pomona.ca.us
Melissa L. Walker	mwalker@dpw.sbcounty.gov
Michael Adler	michael.adler@mcmcn.net
Michael Camacho	MCamacho@pacificaservices.com
Michael Cruikshank	MCruikshank@DBStephens.com
Michael P. Thornton	mthornton@tkeengineering.com
Michael T Fife	MFife@bhfs.com
Michael Thompson	michael.thompson@cdcr.ca.gov
Mike Sigsbee	msigsbee@ci.ontario.ca.us
Monica Heredia	mheredia@chinohills.org
Moore, Toby	TobyMoore@gswater.com
Nadeem Majaj	nmajaj@chinohills.org
Nathan deBoom	n8deboom@gmail.com
Neetu Gupta	ngupta@ieua.org
Noah Golden-Krasner	Noah.goldenkrasner@doj.ca.gov
Pam Sharp	PSharp@chinohills.org
Pam Wilson	pwilson@bhfs.com
Pamela Anderson Cridlebaugh	panderson@niagarawater.com
Patty Jett	pjett@spacecenterinc.com
Paul Deutsch	paul.deutsch@amec.com
Paul Hofer	farmwatchtoo@aol.com
Paul Hofer	farmerhofer@aol.com
Paul Leon	pleon@ci.ontario.ca.us
Paula Lantz	paula_lantz@ci.pomona.ca.us
Peggy Asche	peggy@wvwd.org
Penny Alexander-Kelley	Palexander-kelley@cc.sbcounty.gov
Pete Hall	pete.hall@cdcr.ca.gov
Pete Hall	rpetehall@gmail.com
Peter Hettinga	peterhettinga@yahoo.com
Peter Kavounas	PKavounas@cbwm.org
Peter Rogers	progers@chinohills.org
Rachel Avila	R.Avila@MPGLAW.com
Ramsey Haddad	ramsey.haddad@californiasteel.com
Randall McAlister	randall.mcalister@ge.com
Raul Garibay	raul_garibay@ci.pomona.ca.us
Ray Wilkings	rwilkins@autoclubspeedway.com
Rene Salas	Rene_Salas@ci.pomona.ca.us
Rick Darnell	Richard.Darnell@nrgenergy.com
Rick Hansen	rhansen@tvmwd.com
Rick Rees	Richard.Rees@amec.com
Rick Zapien	rzapien@cbwm.org
Rita Pro	rpro@cityofchino.org
Rob Vanden Heuvel	robert.t.van@gmail.com
Robert C. Hawkins	RHawkins@earthlink.net
Robert Craig	rcraig@jcsd.us
Robert DeLoach	robertadeloach1@gmail.com
Robert Neufeld	robneu1@yahoo.com
Robert Tock	rtock@jcsd.us
Robert Wagner	rwagner@wbecorp.com
Rogelio Matta	rmatta@fontana.org
Roger Florio	roger.florio@ge.com
Roger Han	roger_han@praxair.com

Ron Craig	ronc@mbakerintl.com
Ron LaBrucherie, Jr.	ronLaBrucherie@gmail.com
Rosemary Hoerning	rhoerning@ci.upland.ca.us
Ryan Shaw	rshaw@ci.ontario.ca.us
Sandra S. Rose	directorrose@mvwd.org
Sarah Kerr	skerr@ci.ontario.ca.us
Sarah Schneider	sarah.schneider@amec.com
Scott Burton	sburton@ci.ontario.ca.us
Scott Runyan	srunyan@cc.sbcounty.gov
Scott Slater	sslater@bhfs.com
Shaun Stone	sstone@ieua.org
Sheri Rojo	smrojo@aol.com
Sonya Barber	sbarber@ci.upland.ca.us
Sonya Bloodworth	sbloodworth@wmwd.com
Sophie Akins	Sophie.Akins@cc.sbcounty.gov
Stella Gasca	sgasca@ci.ontario.ca.us
Stephanie Riley	sriley@ieua.org
Steve Nix	snix@chinohills.org
Steve Riboli	steve.riboli@sanantoniowinery.com
Steven J. Elie	selie@ieua.org
Steven J. Elie	s.elie@mpglaw.com
Suki Chhokar	schhokar@sdswa.org
Susan Collet	scollett@jcsd.us
Sylvie Lee	slee@ieua.org
Tara Rolfe, PG	TRolfe@weiwater.com
Taya Victorino	tayav@cvwdwater.com
Teri Layton	tlayton@sawaterco.com
Terry Catlin	tlcatlin@wfajpa.org
Tim Barr	tbarr@wmwd.com
Todd Corbin	tcorbin@jcsd.us
Todd Minten	tminten@chinodesalter.org
Tom Crowley	tcrowley@wvwd.org
Tom Cruikshank	tcruikshank@spacecenterinc.com
Tom Harder	tharder@thomashardercompany.com
Tom Haughey	tom@haugheyinsurance.com
Tom O'Neill	toneill@ci.ontario.ca.us
Tom Thomas	tthomas@insuranceinc.com
Toni Medel	mmedel@rbf.com
Ursula Stuter	ursula.stuter@cdcr.ca.gov
Van Jew	vjew@mvwd.org
Vicki Hahn	vhahn@tvmwd.com
Vicky Rodriguez	vrodriagu@ci.ontario.ca.us
Vivian Castro	VCastro@cbwcd.org
W. C. "Bill" Kruger	citycouncil@chinohills.org
Willian Urena	WURENA@ANGELICA.COM