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*Fee Exempt Per Gov. Code § 6103*

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

10	_____ )	Case No. RCV 51010
11	CHINO BASIN MUNICIPAL WATER )	Assigned For All Purposes to:
	DISTRICT )	Hon. Stanford E. Reichert
12	) Plaintiff,	
13	) vs.	<b>RESPONDING AP MEMBERS</b>
14	CITY OF CHINO, et al., )	<b>REPLY TO OPPOSITION BRIEFS</b>
15	) Defendants.	<b>RE REVISED TENTATIVE ORDER</b>
16	_____ )	<b>RE WATERMASTER’S MOTION RE</b>
		<b>2015 SAFE YIELD RESET</b>
17		<b>AGREEMENT</b>
18		<u>Hearing on Motion:</u>
		Date: April 28, 2017
		Time: 1:30 p.m.
		Department: S35

19  
20 This Reply to the opposition and response briefs filed by Watermaster, Jurupa  
21 Community Services District, and the Cities of Chino and Ontario (generally referred to as  
22 “Opposing Briefs”) is submitted on behalf of the following members of the Appropriative Pool  
23 (collectively referred to as “Responding AP Members”):

- 24
- 25 1. Monte Vista Water District;
  - 26 2. Cucamonga Valley Water District;
  - 27 3. City of Pomona; and
- 28

1                   4. City of Upland.

2                   There are several arguments common to two or more of the Opposing Briefs. Responding AP  
3                   Members will briefly respond to each argument.

4                   **I.       DESALTER-INDUCED RECHARGE IS NOT PART OF SAFE YIELD SO IT**  
5                   **CANNOT BE “SEQUESTERED” FROM SAFE YIELD.**

6                   Contrary to the Opposing Briefs, Desalter-Induced Recharge is *not* part of Safe Yield  
7                   so it cannot be “sequestered” from Safe Yield. [See WM Brief at 2:18-21; Jurupa Brief at 2:6-  
8                   17; and Ontario Brief at 3:23-27.] In support of this argument, the Opposing Briefs assert that  
9                   “Safe Yield” includes all inputs/outputs to/from the Basin. [WM Brief at 2:7-10, citing  
10                  Wildermuth Dec. at ¶ 3; Ontario Brief at 3:9-14, citation omitted.] This assertion is wrong  
11                  under the Judgment, CAMA, and the Court’s Revised Proposed Order because it disregards an  
12                  important exclusion from the definition of “Safe Yield”, which is that stored water and  
13                  replenishment water are excluded from Safe Yield. [Judgment at ¶ 4(x).] Since certain  
14                  sources of water to the Basin are *excluded* from the definition of “Safe Yield”, then Safe Yield  
15                  does *not include* all inputs to the Basin.

16                  As this Court’s Revised Proposed Order correctly explains: “Water produced/pumped  
17                  by the Desalters is New Yield and sourced by induced recharge and overdraft. As New Yield,  
18                  water pumped by the Desalters is *not* Safe Yield or Safe Operating Yield.” [Rev. Prop. Order  
19                  at 38:14-27; see *id.* at 35: 10-13.]

20                  The newly proposed “sequestration” accounting to reset Safe Yield at 135,000 AFY by  
21                  first adding and then subtracting (“sequestering”) Desalter-Induced Recharge to and from Safe  
22                  Yield is an accounting construct that the Court’s Revised Proposed Order correctly finds to  
23                  contradict Peace I and Peace II. [Rev. Prop. Order at 56:13-20.] Under Paragraph 7.1 of  
24                  Peace II, Desalter-Induced Recharge is dedicated to replenish Desalter overproduction for the  
25                  26  
27  
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1 initial term of Peace I. Therefore, as replenishment water, Desalter-Induced Recharge is  
2 categorically distinct from Safe Yield [Judgment at ¶ 4(x)], and because Watermaster’s  
3 proposed Safe Yield of 135,000 AFY includes Desalter-Induced Recharge (e.g. 20,000 AFY),  
4 the Safe Yield calculation categorically must exclude Desalter-Induced Recharge and be reset  
5 at 115,000 AFY. [See Peace II at ¶ 7.1.]  
6

7 **II. PEACE II IS UNAMBIGUOUS SO THE COURT SHOULD NOT ENGAGE IN**  
8 **CONTRACT INTERPRETATION BY ADOPTING THE PROPOSED**  
9 **“SEQUESTRATION” ACCOUNTING.**

10 The newly proposed “sequestration” accounting is an attempt to interpret Peace II,  
11 which is a Court approved contract. [See WM Brief at 2:18-21; see also Jurupa Brief at 2:6-  
12 17; and Ontario Brief at 3:23-27.] Contract language warrants interpretation by a Court only if  
13 the language is ambiguous. As the California Supreme Court stated:  
14

15 Under statutory rules of contract interpretation, the mutual  
16 intention of the parties at the time the contract is formed governs  
17 interpretation. Such intent is to be inferred, if possible, solely from  
18 the written provisions of the contract. The ‘clear and explicit’  
19 meaning of these provisions, interpreted in their ‘ordinary and  
20 popular sense,’ unless ‘used by the parties in a technical sense or a  
21 special meaning is given to them by usage,’ controls judicial  
22 interpretation. Thus, if the meaning a layperson would ascribe to  
23 contract language is not ambiguous, we apply that meaning.  
24 [Santisas v. Goodin (1998) 17 Cal.4th 599, 608, internal citations  
25 omitted.]

26 Here, Paragraph 7.1 of Peace II *unambiguously* states that: “For the initial term of the  
27 Peace Agreement, neither Watermaster nor the Parties will request the Safe Yield be  
28 recalculated in a manner that incorporates New Yield attributable to the Desalters into the  
determination of Safe Yield ....” [Peace II at ¶ 7.1.]

Peace II is unambiguous so the Court should not adopt the “sequestration” accounting  
interpretation of Paragraph 7.1 as asserted in the Opposing Briefs. In addition, as discussed

1 next, the Opposing Briefs invite the Court to engage in accounting interpretations as part of  
2 Safe Yield reset, which is contrary to the Court’s Revised Proposed Order.

3 **III. CONTRARY TO THE COURT’S REVISED PROPOSED ORDER, THE**  
4 **OPPOSING BRIEFS INVITE THE COURT TO ENGAGE IN AN**  
5 **ACCOUNTING CONSTRUCT OF ITS ORDER.**  
6

7 Contrary to the Court’s Revised Proposed Order, the Opposing Briefs attempt to  
8 engage this Court in an accounting construct regarding an alleged harm. [See Ontario Brief at  
9 5:27 – 6:3; Chino Brief at 5:6-11; see Jurupa Brief at 2:1-4.] However, the Court’s Revised  
10 Proposed Order expressly states that the Court will not “speculate on the practical effect of its  
11 legal orders,” such as the “harm” alleged in the Opposing Briefs. [See Rev. Prop. Order at 5 of  
12 10:3-9; see also 3 of 10:20-25; 4 of 10:18-23; and 9 of 10:24-26.] “[U]nless assisted by a  
13 special referee, [the Court] will not engage [in] determining the practical impact of its orders.”  
14 [Id. at 5 of 10:5-7.]  
15

16 In addition, the Court’s Revised Proposed Order repeatedly states that it “does not need  
17 any further clarification or accounting for the reasons set forth in the revised proposed order.”  
18 [Id. at 4 of 10:11-13 and 15-16.] “[I]t would be Watermaster to provide clarification by  
19 accounting for the financial and physical consequences of the entire tentative order, not court  
20 to do so.” [Id. at 7 of 10:11-13.]  
21

22 Accordingly, the Court may disregard the Opposing Briefs’ attempt to engage an  
23 accounting construct – particularly one that attempts to circumvent the Court’s intended ruling  
24 that Desalter-Induced Recharge is *not* to be included in the recalculation of Safe Yield. If the  
25 Court is inclined to engage the practical impacts of its Revised Proposed Order, then  
26 Responding AP Members briefly respond as follows: Responding AP Members’ solution to  
27 reset Safe Yield to 115,000 AFY adheres to and is consistent with the definitions of “Safe  
28

1 Yield” in Paragraph 4(x) of the Judgment, “New Yield” in Paragraph 1.1(aa) of the Peace  
2 Agreement, and Paragraph 7.1 of Peace II. It also protects the priorities for allocation of  
3 unproduced Agricultural Pool water set forth in Paragraph 10(a) of Exhibit H to the Judgment.

4 **IV. RESETTING SAFE YIELD TO 115,000 AFY IS SUPPORTED BY**  
5 **WATERMASTER’S TECHNICAL RECORD.**  
6

7 Contrary to the Opposing Briefs, resetting Safe Yield to 115,000 AFY *is* supported by  
8 Watermaster’s technical record. [See Ontario Brief at 6:4-5; see WM Brief at 2:10-11.] The  
9 technical basis is set forth in WEI’s declaration in which Mark Wildermuth declared: “My  
10 estimate of Safe Yield considered recharge from all inputs into the Basin, *inclusive of inflow*  
11 *from the Santa Ana River that is attributable to the operation of the Chino Basin Desalters.*”  
12 [Wildermuth Dec. at ¶ 3 attached to Watermaster’s Response to February 22, 2017 Order;  
13 emphasis added.]  
14

15 **V. THE RESPONDING AP MEMBERS PRIOR SUPPORT OF THE 2015 SYRA**  
16 **DOES NOT BIND THEM TO THE 135,000 AFY SAFE YIELD RESET.**

17 The Opposing Briefs suggest that the Responding AP Members prior support of the  
18 Safe Yield reset at 135,000 AFY under SYRA precludes them from currently supporting a  
19 Safe Yield reset at 115,000 AFY. [See Jurupa Brief at 1:22-26; Ontario Brief at 6:15-18; and  
20 Chino Brief at 3:13-25.] However, Responding AP Members previously supported an  
21 integrated settlement of numerous issues, reached after extensive negotiations. Responding  
22 AP Members agreed to SYRA as a whole, but the Court declined to enforce SYRA as whole.  
23

24 The parties’ obligations under SYRA were subject to certain conditions precedent,  
25 including a court order directing “Watermaster to proceed in accordance with the terms of  
26 [SYRA] as embodied in Resolution 2015-06.” [SYRA, § 2.1(b)(iii) at p. 7.] The Court  
27 declined to issue this order, and instead stated that “[e]xcept for the Safe Yield reset to 135,000  
28

1 AFY, . . . the court has ruled that *no part of SYRA will be enforced.*” [Rev. Prop. Order at 7 of  
2 10:20-21; emphasis added.] The Court also asked Watermaster and the parties for additional  
3 briefing regarding the relationship between Safe Yield reset at 135,000 AFY and New Yield  
4 under Paragraph 7.1 of Peace II. [Rev. Prop. Order at 8 of 10:21-28.]

5  
6 Since SYRA will not be enforced and additional briefing is ongoing, Responding AP  
7 Members are not bound by SYRA or their prior support of resetting Safe Yield at 135,000  
8 AFY. Without SYRA’s preconditions and accounting provisions, the Responding AP  
9 Members must fall back on the Judgment and CAMA, as the Court has done. The *newly*  
10 proposed “sequestration” accounting contradicts the Judgment, CAMA, and the Court’s  
11 intended rulings; whereas, Responding AP Members’ position to reset Safe Yield at 115,000  
12 AFY is consistent with the unambiguous language of the Judgment, CAMA, and the Court’s  
13 intended rulings.  
14

15 **VI. THE COURT HAS HISTORICALLY APPOINTED, AND SHOULD ONCE**  
16 **AGAIN APPOINT, A SPECIAL REFEREE TO ASSIST THE COURT,**  
17 **WATERMASTER, AND PARTIES WITH THE EFFECT OF ITS INTENDED**  
18 **RULINGS.**

19 Contrary to the Opposing Briefs, this Court should appoint a special referee. [See  
20 Ontario Brief at 6:19 - 7:4; and Chino Brief at 6:1 – 5:1.] The Court’s Revised Proposed  
21 Order repeatedly offers to appoint a special referee “[i]f Watermaster and the parties wish to  
22 engage the Court on specific physical consequences of the Court’s order” or the “practical  
23 effect of its rulings.” [Rev. Prop. Order at 3:20-25; see 4:18-23 and 5:4-9.] The parties are  
24 still struggling with the physical, practical, and economic impacts of the Court’s Revised  
25 Proposed Order as evidenced by their Opposing Briefs, particularly their attempt to engage the  
26 accounting construct as discussed above.  
27  
28

1 Ontario’s brief asserts that Responding AP Members have not identified issues to  
2 support the appointment of a special referee, but the Court did not precondition its offer on the  
3 identification of issues. [See Ontario Brief at 6:19-24.] Notably, Ontario “reserve[d] its right  
4 to advocate for the appointment of a special referee in the future if circumstances warrant.”  
5 [Id. at 7:2-4.]  
6

7 Chino’s brief objected to the appointment of a special referee because the Responding  
8 AP Members did not file a written motion or identify questions of fact under Section 639 of  
9 the *Code of Civil Procedure*. [Chino Brief at 4:4-15.] Again, however, the Court did not  
10 precondition its offer upon compliance with statutory requirements, including a noticed  
11 motion, in order to appoint a special referee. Watermaster and the parties are still struggling  
12 with the physical, practical, and economic impacts of the Court’s intended rulings and the  
13 Court has recognized that a special referee is needed to engage these impacts.  
14

15 Historically, a special referee was instrumental in finalizing both the Optimum Basin  
16 Management Plan and certain Peace II conditions that were approved by the Court. The  
17 Orders implementing the Judgment and Physical Solution have been, and will continue to be,  
18 predicated on technical and “non-legal” determinations, which is why this Court should  
19 consider appointing a special referee if the Court is not inclined to engage such determinations.  
20 Such an appointment is consistent with the ongoing implementation of the Judgment and  
21 Physical Solution of this case. [Judgment, ¶¶ 39, 40.]  
22

23 Similar to Ontario, Chino “may be open to a special referee depending on the factual  
24 questions to be submitted” for the referee’s determination. [Id. at 6:1 – 5:1.] The Responding  
25 AP Members have already accepted the Court’s offer to appoint a special referee. Chino and  
26 Ontario, despite their objections, are open to (or reserved the right to advocate for) a special  
27 referee. Accordingly, a special referee should be appointed.  
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**VII. CONSISTENT WITH THE JUDGMENT, CAMA, AND REVISED PROPOSED ORDER, SAFE YIELD MUST BE RESET TO 115,000 AFY.**

Paragraph 4(x) of the Judgment, Paragraph 1.1(aa) of the Peace Agreement, Paragraph 7.1 of Peace II, and the Court's Revised Proposed Order compel Safe Yield to be reset at 115,000 AFY.

Dated: April 7, 2017

KIDMAN LAW LLP

By: 

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MONTE VISTA WATER DISTRICT



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 7, 2017 I served the following:

1. RESPONDING AP MEMBERS REPLY TO OPPOSITION BRIEFS RE REVISED TENTATIVE ORDER RE WATERMASTER'S MOTION RE 2015 SAFE YIELD RESET AGREEMENT

/X/ 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.

/X/ 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 7, 2017 in Rancho Cucamonga, California.



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