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City of Ontario

EXEMPT FROM FILING FEES
PURSUANT TO GOV. CODE, § 6103

9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SAN BERNARDINO

12 CHINO BASIN MUNICIPAL WATER
DISTRICT,

13 Plaintiff,

14 v.

15 CITY OF CHINO, et al.,

16 Defendants.

CASE NO. RCVRS 51010

ASSIGNED FOR ALL PURPOSES TO
HONORABLE STANFORD E. REICHERT

DECLARATION OF SCOTT BURTON IN
SUPPORT OF CITY OF ONTARIO'S
COMBINED REPLY TO OPPOSITIONS

RE: APPLICATION FOR AN ORDER TO
EXTEND TIME UNDER JUDGMENT,
PARAGRAPH 31(C) TO CHALLENGE
WATERMASTER ACTION/DECISION
ON NOVEMBER 18, 2021 TO APPROVE
THE FY 2021/2022 ASSESSMENT
PACKAGE. IF SUCH REQUEST IS
DENIED, THIS FILING IS THE
CHALLENGE

Hearing:

Date: April 22, 2022

Time: 1:30 p.m.

Dept.: S35

1 I, Scott Burton, declare as follows:

2 1. I have personal knowledge of the facts stated in this Declaration and, if called as a
3 witness, could and would testify competently to those facts.

4 2. I am the Utilities General Manager at the City of Ontario (“Ontario”) and have held
5 that position since January 2012.

6 3. I make this Declaration in support of Ontario’s Combined Reply to the Oppositions
7 of Watermaster, Fontana Water Company and Cucamonga Valley Water District, and Inland
8 Empire Utilities Agency to the Application for an Order to Extend Time Under Judgment,
9 Paragraph 31(c) and Challenge of Watermaster Action/Decision on November 18, 2021 to
10 Approve the FY 2021/2022 Assessment Package.

11 4. On November 1, 2021, Ontario sent a letter to Mr. Kavounas, Watermaster General
12 Manager, that outlined questions and comments to the draft Fiscal Year 2021/2022 Assessment
13 Package. Ontario requested that the Chino Basin Watermaster (“Watermaster”) explain the basis
14 for exempting 23,000 acre-feet (AF) of water produced from the Metropolitan Water District’s
15 (“MWD”) Chino Basin Conjunctive Use Program (“CUP”), also known as the Dry Year Yield
16 Storage and Recovery Program (“DYY Program”), as identified in the draft Fiscal Year 2021/2022
17 Assessment Package, from the Watermaster assessment and the Desalter Replenishment Obligation
18 (“DRO”) assessment. Under the 1978 Chino Basin Judgment (“Judgment”), this production should
19 have been assessed. The Watermaster waived assessments for two Parties of the Chino
20 Groundwater Basin, the Cucamonga Valley Water District (“CVWD”) and the Fontana Water
21 Company (“FWC”), inconsistent with the Judgment. A true and correct copy of the letter dated
22 November 1, 2021, is attached hereto as Exhibit 1 and incorporated herein by reference.

23 5. On November 18, 2021, the Watermaster presented a staff report to the Watermaster
24 Board in response to Ontario’s November 1, 2021 letter. The Watermaster Board directed
25 Watermaster Staff and legal counsel to evaluate the concerns raised by Ontario surrounding the
26 DYY Program and related applicability to Watermaster assessments. (See Request for Judicial
27 Notice (“RJN”), Ex. 61.)

28

1 6. On November 18, 2021, the Watermaster Board approved the Fiscal Year
2 2021/2022 Assessment Package. Ontario understood that resolution of the questions and comments
3 raised regarding the DYY Program would not affect the ability to retroactively address the Fiscal
4 Year 2021-2022 Assessment Package. The Watermaster staff report also confirmed that the
5 assessment package could always be changed retroactively if warranted. (RJN, Ex. 61 at p. 6.)

6 7. In an effort to exhaust all administrative remedies, on January 5, 2022, the
7 Watermaster, Ontario, CVWD, and FWC met to discuss the DYY Program issues and began good
8 faith negotiations.

9 8. On January 24, 2022, Ontario, CVWD, and FWC met to discuss a draft settlement
10 term sheet and to continue good faith negotiations. During this meeting, Ontario mentioned that if
11 this issue needed to be raised in Court, conflict waivers might be necessary. No objections or
12 agreements were raised concerning such waivers and Ontario continued to actively work with the
13 Parties and Watermaster to reach a resolution.

14 9. Also on January 24, 2022, Ontario sent a letter to Mr. Kavounas, the Watermaster
15 General Manager, detailing Ontario's concerns with Watermaster's administration of the DYY
16 Program. A true and correct copy of the letter dated January 24, 2022, is attached hereto as
17 Exhibit 2 and incorporated herein by reference.

18 10. On January 27, 2022, the Watermaster presented a staff report to the Watermaster
19 Board in response to Ontario's concerns that were reiterated in the January 24, 2022 letter and in
20 response to the Watermaster Board's direction on November 18, 2021. (RJN, Ex. 42.) However,
21 when asked, Watermaster's general counsel stated that he was "not prepared to provide a legal
22 opinion in this moment." It was understood by Ontario that in order to comply with the
23 Watermaster Board's direction on November 18, 2021, a report with legal counsel's opinion would
24 be forthcoming.

25 11. On January 27, 2022, Ontario sent a request to FWC for a conflict-of-interest
26 waiver. On the same day, Ontario started looking at other options for legal counsel. A true and
27 correct copy of the January 27, 2022 email is attached hereto as Exhibit 3 and incorporated herein
28 by reference.

1 12. On February 3, 2022, Ontario sent a revised draft settlement terms sheet to CVWD
2 and FWC that addressed comments received during the January 24, 2022 meeting. Ontario
3 circulated the revised draft seeking additional input and discussion on issues raised by CVW and
4 FWC.

5 13. On February 11, 2022, Ontario requested that the Watermaster general counsel
6 approve an extension to the 90-day period if determined necessary by Watermaster. Although the
7 Watermaster initially indicated that it might stipulate to an extension, it ultimately refused. On the
8 same day, FWC informed Ontario that it would not grant a conflict-of-interest waiver. When
9 Ontario inquired about the revised draft settlement terms sheet, FWC said that they were looking
10 at it and would talk to CVWD.

11 14. On February 14, 2022, Ontario began actively pursuing other legal representation
12 on the specific issues involved in this legal challenge.

13 15. On February 15, 2022, Ontario was informed that the Watermaster Board officers
14 convened a meeting at 5:00 PM on February 14 and if no other Board direction was received, an
15 email would be sent to Ontario. This email was never received by Ontario. At the time of this
16 meeting, the Board officers include James Curatalo, Jeff Pierson, and Bob Kuhn. Mr. Kuhn
17 represents TVMWD, which subsequently joined Watermaster's opposition to Ontario's current
18 Application. Similarly, James Curatolo represents CVWD, who also opposes Ontario's
19 Application. Neither the Judgment nor any subsequent Court order confers any special duties or
20 responsibilities to Board officers, such as receiving legal advice and providing direction
21 independent of a full Board action.

22 16. On February 16, 2022, Ontario contacted Attorney Charisse Smith, who is on
23 contract with the City of Ontario, to prepare and file Ontario's February 17, 2022 Application.¹
24 Ms. Smith does not specialize in water law and was retained for the limited purpose to assist with
25

26 _____
27 ¹ The "February 17, 2022 Application" means the City of Ontario Application For an Order to
28 Extend Time Under Judgment, Paragraph 31(c) to Challenge Watermaster Action/Decision on
November 18, 2021 to Approve the FY 2021/2022 Assessment Package. If Such Request is Denied,
this Filing is the Challenge filed in this action on February 17, 2022.

1 the filing of the extension request pending Ontario's retention of new water law counsel to represent
2 it on the Watermaster's action on November on November 18, 2021.

3 17. From February 23, 2022 to February 28, 2022, Ontario worked diligently to enter
4 into a professional services agreement for legal representation with a new attorney. During this
5 time, the prospective attorney informed Ontario that he and the entire water law group were moving
6 to a different law firm. It was conveyed to Ontario that this should not be an issue.

7 18. On March 4, 2022, the prospective attorney informed Ontario that due to a conflict
8 of interest at the new law firm, he would not be able to represent Ontario.

9 19. On March 7, 2022, Ontario reinitiated the pursuit of legal representation by
10 contacting multiple attorneys.

11 20. On March 15, 2022, Ontario entered into an engagement agreement with Attorney
12 Elizabeth Ewens at Stoel Rives LLP for legal representation with regard to the Watermaster's action
13 on November 18, 2021.

14 21. Ontario is not aware of any other storage and recovery program applications pending
15 Watermaster review/approval. Even if there were, such programs are generally prepared over years
16 rather than months,

17 I declare under penalty of perjury under the laws of the state of California that the foregoing
18 is true and correct. Executed on this 26th day of May 2022, at Ontario, California.


19 
20 _____
Scott Burton

EXHIBIT 1

CITY OF**ONTARIO**

303 EAST B STREET | ONTARIO, CALIFORNIA 91764

(909) 395-2000 FAX (909) 395-2070 OntarioCA.gov

PAUL S. LEON
MAYORSHEILA MAUTZ
CITY CLERKALAN D. WAPNER
MAYOR PRO TEMJAMES R. MILHISER
TREASURERJIM W. BOWMAN
DEBRA DORST-PORADA
RUBEN VALENCIA
COUNCIL MEMBERSSCOTT OCHOA
CITY MANAGER

November 1, 2021

Peter Kavounas, General Manager
Chino Basin Watermaster
9641 San Bernardino Road
Rancho Cucamonga, CA 91730
Email: pkavounas@cbwm.org

Re: Questions and Comments on the Draft Fiscal Year 2021-2022 Assessment Package

Dear Peter:

The City of Ontario (Ontario) appreciates the opportunity to provide comments and submit questions on the draft Fiscal Year 2021-2022 Assessment Package.

The draft Fiscal Year 2021-2022 Assessment Package identifies a total of 23,000 AF of groundwater production produced from the storage account established for the Metropolitan Water District's (MWD) Chino Basin Conjunctive Use Program (CUP). The Chino Basin CUP and related Chino Basin Watermaster (Watermaster) storage agreements were approved through the Watermaster process in 2003 and 2004. The most recent Amendment No. 8 to the Chino Basin CUP is dated January 23, 2015 and included changes to the Exhibit G Operating Party Performance Criteria. The Operating Party Performance Criteria establishes, among other things, qualifying production as the measurement of a reduction to imported water deliveries and a corresponding replacement with the Chino Basin groundwater stored under this program. Ontario's understanding is that the storage and withdrawal of supplemental water under the Chino Basin CUP can only be done pursuant to a properly approved written agreement with Watermaster and shall not have an adverse impact on other produces.

Ontario requests that Watermaster explain the basis for exempting water produced from MWD's CUP, as identified in the draft Fiscal Year 2021-2022 Assessment Package, from the Watermaster assessment and the Desalter Replenishment Obligation (DRO) assessment. The exemption appears to be based, at least in part, on a March 20, 2019 letter agreement (2019 Letter) from the MWD and signed by Watermaster, Inland Empire Utilities Agency and Three

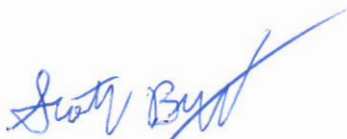
Valleys Municipal Water District with the subject line of "Chino Basin Groundwater Storage Actions and Voluntary Purchase Methodology". Specifically, Ontario would like responses to the following:

1. How did Watermaster evaluate the impacts of this significant change in the recovery of water originally stored under the Chino Basin CUP?
2. Explain and illustrate how the Exhibit G Performance Criteria is being met.
3. The 2019 Letter does not address the topic of Watermaster Assessments. The mechanics of this transaction appear to be more of a stored water purchase & transfer between MWD and individual Parties producing the water. Why is the production of this water not subject to the same assessments as other production by individual Parties?
4. When evaluating the 2019 Letter and the proposed changes, describe the Watermaster approval process. The contemplated changes in the 2019 Letter did not go through the Pools, Advisory Committee, or the Board. What was the basis for forging this process?
5. How was it determined that agencies who are not signatories to the Chino Basin CUP approved by Watermaster are allowed to participate in the recovery of water stored under this program?
6. How was it determined that broad based benefit was still being achieved?

The 2019 Letter fundamentally changed the recovery side of this Watermaster approved storage and recovery program without obtaining an approved written agreement through the Watermaster process. Additionally, the implications of these changes were not represented and/or evaluated to determine the impacts on individual parties.

Ontario appreciates the opportunity to provide comments on the draft Fiscal Year 2021-2022 Assessment Package and looks forward to working collaboratively with Watermaster and the various stakeholders towards a resolution of these concerns.

Sincerely,



Scott Burton, P.E.
Utilities General Manager

CC: Appropriative Pool Parties

EXHIBIT 2

CITY OF



ONTARIO

303 EAST B STREET | ONTARIO, CALIFORNIA 91764

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PAUL S. LEON
MAYOR

ALAN D. WAPNER
MAYOR PRO TEM

JIM W. BOWMAN
DEBRA DORST-PORADA
RUBEN VALENCIA
COUNCIL MEMBERS

SHEILA MAUTZ
CITY CLERK

JAMES R. MILHISER
TREASURER

SCOTT OCHOA
CITY MANAGER

January 24, 2022

Peter Kavounas, General Manager
Chino Basin Watermaster
9641 San Bernardino Road
Rancho Cucamonga, CA 91730
Email: pkavounas@cbwm.org

SENT VIA EMAIL AND CERTIFIED US MAIL

Re: Dry Year Yield Program

Dear Peter,

The City of Ontario (Ontario) appreciates the recent Watermaster Board direction to staff and legal counsel to evaluate the concerns raised by Ontario surrounding the Dry Year Yield Storage and Recovery Program (DYYP) and related applicability to Watermaster assessments. In awaiting this legal report back to the Board, Ontario remains concerned that Watermaster is administering an unauthorized change to the DYYP that is inconsistent with the storage agreement approved by Watermaster and ordered by the Court. This has resulted in a material change to the DYYP, adversely impacts Ontario, and has the potential to further impact Parties to the Judgment in the future. The subject changes are identified in a March 20, 2019 letter agreement (2019 Letter) signed by the Metropolitan Water District (MWD), Watermaster's General Manager, and two MWD member agencies on the Watermaster Board. This was done independent of any formal Watermaster Pool/Advisory/Board approval process, which is unacceptable. The purpose of this letter is to expand on the significance of this issue and provide Watermaster with the opportunity to correct the matter as soon as possible.

Background

Ontario submitted comments and questions on the Draft Fiscal Year 2021-2022 Assessment Package to the Watermaster General Manager in a letter dated November 1, 2021. Ontario's letter discussed the 2019 Letter with the subject line of "Chino Basin Groundwater Storage Actions and Voluntary Purchase Methodology." While Ontario appreciates Watermaster's Staff Reports released on November 16, 2021

and January 7, 2022 regarding this matter, Ontario's concerns remain foundationally in the execution of the 2019 Letter, how it fundamentally changed the recovery aspect of the DYYP, how it is not consistent with the 2004 Court-approved agreements and that it did not go through the formal Watermaster approval process similar to other material DYYP amendments.

The DYYP consists of three sets of agreements ordered by the Court: The 2003 Funding Agreement, the 2004 Storage Agreement, and the Local Agency Agreements such as the one executed by the City of Ontario. The intent of the program is to provide greater water supply reliability by storing water in advance of dry periods and pumping the stored water in lieu of receiving imported water during droughts. The Court found that the DYYP as described in the Funding Agreement provides broad mutual benefit to the parties to the Judgment.

The Court-ordered Funding Agreement indicates that "the specific location and operation of the facilities necessary to accomplish this commitment must still be analyzed by Watermaster..." and "This approval will take the form of Watermaster approval of the Local Agency Agreements..." Consistent with the Funding Agreement, the Local Agency Agreements define each agencies' facilities and annual recovery capacity, including performance targets of an imported water shift and program water extraction for each participating agency.

The Local Agency Agreements are the foundation of the storage and recovery program storage application, subsequent analysis, approvals, and ultimately the Court-approved Storage Agreement. As stated in the 2003 Court Order, "until Watermaster and this Court approve the Local Agency Agreements and Storage and Recovery Application ... the storage and recovery program cannot be undertaken." Additionally, per the Watermaster Storage Agreement, "Any modification of facilities that is materially different than those contemplated by the Local Agency Agreements will require the filing of a new application." The intent of the performance criteria per Amendment No. 8 to the Groundwater Storage Program Funding Agreement, Exhibit G is "to reduce imported water deliveries to the Operating Parties and replace it with stored Chino Basin groundwater..." (underline added for emphasis). Recovery of water under the 2019 Letter is inconsistent with the Local Agency Agreements and is therefore inconsistent with the Court Orders and should be determined as impermissible by Watermaster as an arm of the Court. In addition, it seems to remove the DYYP performance criteria that historically served as the basis for Watermaster to waive assessments.

During the initial project development there were amendments to the Funding Agreement that pertained to the completion timing of facilities and changes in sources of funds. The only material change to the DYYP occurred with the 2015 Amendment No. 8 to the Funding Agreement, which was universally approved through the Watermaster process after the Operating Parties approved amendments to the Local Agency Agreements with the same changes to the Exhibit G Performance Criteria. While Amendment No. 8 made material changes to the program, they were nowhere near as significant as those found in the 2019 Letter which changed the amount of water each agency was able to recover, as well as when and how that water was recovered. The 2019 Letter was not accompanied by corresponding changes to the Local Agency Agreements, was not approved through the Watermaster process, and also allowed Parties without Local Agency Agreements to participate in the DYYP.

Ontario's Concerns

Watermaster is allowing the recovery of water from the DYYP storage account that is not consistent with the storage agreement approved via the Watermaster process and ordered by the Court in 2004. The 2019 Letter fundamentally changed the recovery side of this Watermaster approved storage and recovery program. The 2019 Letter changed the application of the Exhibit G Performance Criteria and allowed for water to be recovered outside of the Local Agency Agreements (in terms of agency, location, and quantity) without a corresponding shift off of imported water. In effect, this is production of supplemental water from storage and must be treated as such under the provisions of the Judgement and Peace Agreements.

Regarding assessments, the Judgment requires virtually all production to be assessed in order to pay for Watermaster activities in a shared fashion based on beneficial use of the Basin. Waiving assessments on some production inherently places a greater expense on the remaining production that is factored into assessments. Court approval of the Funding Agreement and Storage Agreement (and subsequent Local Agency Agreements) does not explicitly define how assessments shall be handled, but Watermaster has historically waived assessments (or assessed during in-lieu put) on water produced under the approved DYYP without objection. What is different now is that the 2019 Letter fundamentally changed the DYYP as approved by the Court, as approved by the Parties through the Local Agency Agreements, and as approved through the Watermaster process. Table 1 below shows the program as it was approved by the Court and as it has been modified by the 2019 Letter. Watermaster is not authorized by the Court or otherwise to allow DYYP water to be recovered in this manner or to exempt this production from pumping assessments. Watermaster must administer assessments consistent with the Judgment and Court Orders.

Table 1 - DYY Performance Criteria 2004 vs Draft FY 2021/22 Assessment Package

Appropriator	2004 - Original DYY Agreement		FY 2021/22 Assessment Package	
	Req. IW Shift (AF)	Req. DYY GW Take (AF)	Req. IW Shift (AF)	DYY Claim (AF)
City of Chino	1,159	1,159	0	0
City of Chino Hills	1,448	1,448	0	0
City of Ontario	8,076	8,076	0	0
City of Pomona	2,000	2,000	0	0
City of Upland	3,001	3,001	0	0
Cucamonga Valley Water District	11,353	11,353	0	20,500
Fontana Water Company	No Local Agency Agreement		0	2,500
Jurupa Community Services District	2,000	2,000	0	0
Monte Vista Water District	3,963	3,963	0	0
Total	33,000	33,000	0	23,000

Notes:

1. Operating Plan Varies year to year
2. Voluntary Claim is any pumping above Groundwater Baseline and below Physical Production

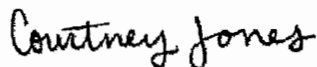
Additionally, the 2019 Letter impacted the broad-based benefit of the program, which is to provide greater water supply reliability by storing water in advance of dry periods and pumping the stored water in lieu of receiving imported water during droughts. Considering the current drought predicament, a participating agency's ability to access imported water has been greatly impacted by allowing the DYYP storage account to be drained outside of its originally intended purpose. This impact is further illustrated by MWD's urgent introduction in January 2022 of two newly proposed imported water delivery deferment programs that similarly seek to accomplish the original intent of the DYYP, a corresponding shift from imported water to groundwater.

Conclusion

The 2019 Letter fundamentally changed the recovery side of this Court-ordered and Watermaster approved storage and recovery program without the necessary approvals. The implications of these changes were not represented and/or evaluated to determine the material physical impacts on individual parties and the Chino Basin. Watermaster signed off on a material change to the recovery of water under the DYYP which is inconsistent with the Court Order and without formal review and approval through the Watermaster process. This sets an alarming precedence for future Watermaster lead endeavors and infringes upon Ontario's rights and protections under the Judgment and related Court Orders that Watermaster is charged with administering. Ontario is requesting that Watermaster cease any further implementation of the 2019 Letter and amend assessment packages as applicable.

Ontario looks forward to working collaboratively with Watermaster and impacted parties towards a resolution of these concerns.

Sincerely,



Courtney Jones, P.E.
Water Resources and Regulatory Affairs Director

CC: Chino Basin Watermaster Board
Eduardo Espinoza, Appropriative Pool Chair
Brian Geye, Non-Agricultural Pool Chair
Bob Feenstra, Agricultural Pool Chair

EXHIBIT 3

From: Scott Burton

Sent: Thursday, January 27, 2022 5:33 PM

To: Josh M. Swift (jmswift@fontanawater.com) <jmswift@fontanawater.com>; rjdiprimio@sgvwater.com

Subject: Request for Conflict Waiver

Good afternoon Robert and Josh,

As you know, Ontario has raised a concern with Watermaster about its handling of the DYY program and related impact on assessments (see attached letter for specifics).

Ontario recently met with Josh and CVWD about potential remedies that would keep the issue out of Watermaster Court. I appreciated the opportunity to meet and discuss approaches to a settlement of some sort.

Typically Fred Fudacz represents Ontario on Watermaster activities but in this case he has a conflict because it involves FWC's recent participation in the DYY program and a potential financial impact, albeit relatively small. Hopefully it is not necessary to seek Court clarification but Ontario needs to start preparing for that possibility. I'm requesting that your agency consider the matter and let me know if you are willing to provide a conflict waiver. As mentioned to Josh, Ontario is willing to provide a conflict waiver for BB&K to be able to represent CVWD if they so choose.

Please consider the request and let me know as soon as possible. Also I'm happy to discuss.