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

11 CHINO BASIN MUNICIPAL WATER
12 DISTRICT,

13 Plaintiff,

14 v.

15 CITY OF CHINO, et al.,

16 Defendant.

Case No. RCVRS51010

[Assigned for All Purposes to the Honorable
Gilbert Ochoa]

**CHINO BASIN WATERMASTER'S
OPPOSITION TO ONTARIO'S MOTION
CHALLENGING WATERMASTER'S
NOVEMBER 17, 2022
ACTIONS/DECISION TO APPROVE THE
FY 2022/2023 ASSESSMENT PACKAGE**

Date: April 5, 2023
Time: 9:00 a.m.
Dept.: S24

[Declaration of Peter Kavounas in Support of
Chino Basin Watermaster's Opposition to
Ontario's Motion Challenging Watermaster's
November 17, 2022 Actions/Decision to Approve
the FY 2022/2023 Assessment Package filed
concurrently herewith]

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1 **I. INTRODUCTION**

2 On November 23, 2022, this Court determined that Ontario’s challenge to Watermaster’s
3 Fiscal Year (“FY”) 2021/2022 Assessment Package (“Prior Challenge”) was effectively a
4 challenge to a 2019 letter agreement¹ regarding the Dry Year Yield Program (“DYYP”), and was
5 time barred. (November 3, 2022 Order denying Ontario’s Application for an Order to Extend
6 Time Under Judgment, Paragraph 31(c) to Challenge Watermaster Action/Decision on November
7 18, 2021 to Approve the FY 2021/2022 Assessment Package (“November 3, 2022 Order”).)
8 Ontario now seeks to refresh and restate its prior challenge against the same assessment
9 mechanism for a new year arising from the same transaction and occurrence, through its February
10 15, 2023 Motion Challenging Watermaster’s November 17, 2022 Actions/Decision to Approve
11 the FY 2022/2023 Assessment Package (“Motion”). The crux of its challenge remains that
12 Watermaster failed to properly account for and assess the recovery of supplemental water stored
13 under the DYYP as “production” in the FY 2022/2023 Assessment Package.

14 Seeking to avoid the disposition of the November 3, 2022 Order, this time Ontario
15 contends that Watermaster breached a duty arising from the failure to comply with performance
16 criteria in Exhibit “G” to the Dry-Year Yield Agreement² (“Exhibit G”) – rather than the adoption
17 of the 2019 Letter Agreement itself. It then repeats its previous contentions that the failure to
18 assess the withdrawal of stored water violates the Judgment and Court orders because it is
19 “production” and that Watermaster failed to provide proper notice of the 2019 Letter Agreement
20 to Ontario.

21 Insofar as the argument that there is an alleged breach of the performance criteria in
22 Exhibit G, the simple answer is that the intent of the parties thereto and the plain meaning of the
23 2019 Letter Agreement is that the Metropolitan Water District of Southern California (“MWD”)
24 – the entity that owns the stored water – was to enable more liberal terms of withdrawal to
25 encourage the groundwater to be extracted – and not be held as a holdover in storage beyond the
26 term of its Dry-Year Yield Agreement. It would be contrary to the objective intent of the parties

27 ¹ See Ontario Request for Judicial Notice (“Ontario RJN”), Exh. 34 (“2019 Letter Agreement”).

28 ² Agreement No. 49960 Groundwater Storage Program Funding Agreement; see Ontario RJN, Exh. 8.

1 to the 2019 Letter Agreement to authorize voluntary withdrawals only to maintain the restrictive
2 criteria in Exhibit G that would severely inhibit withdrawals.

3 **II. BACKGROUND**

4 The facts giving rise to this dispute are as previously briefed for this Court. On November
5 3, 2022, this Court denied Ontario’s Prior Challenge relating to FY 2021/2022 Assessment
6 Package. (Motion, p. 4.) On February 15, 2023, Ontario filed this Motion challenging the FY
7 2022/2023 Assessment Package on nearly identical grounds as its Prior Challenge. Mindful of the
8 extensive previous briefing and the Court’s November 3, 2022 Order, Watermaster respectfully
9 refers the Court to, and hereby incorporates, all filings, briefing, and orders made with respect to
10 the Prior Challenge. Following denial of the Prior Challenge, Ontario filed an appeal of the
11 Court’s November 3, 2022 Order. (Motion, p. 4.)

12 **A. Watermaster Assessment of DYYP Deposits and Withdrawals**

13 MWD is the owner and holder of the DYYP storage account. (Declaration of Peter
14 Kavounas in Support of Watermaster’s Opposition to Ontario’s Motion Challenging
15 Watermaster’s November 17, 2022 Actions/Decision to Approve the FY 2022/2023 Assessment
16 Package [“Kavounas Decl.”] ¶ 3.) To fill the account, there must be “deposits” into the DYYP
17 account. (*Id.*) Deposits are accomplished in two ways: (1) direct recharge of wet water into the
18 Basin and (2) “in-lieu” recharge of the Basin. (*Id.*) The former is self-explanatory, the latter refers
19 to a means of depositing water by taking surface water and leaving groundwater that a Party
20 might lawfully pump, in the ground. The net effect is the same.

21 Where the DYYP is concerned, a participating Party takes imported water from MWD
22 directly into its delivery system and foregoes the pumping of the groundwater it would otherwise
23 produce. (Kavounas Decl. ¶ 5.) An “in-lieu” deposit into MWD’s DYYP storage account is
24 effectuated. “In-lieu” recharge is accomplished through TVMWD, IEUA, and the participating
25 retailers in the DYYP via the Dry-Year Yield Agreement. (*Id.*) IEUA is designated by the DYYP
26 Operating Committee as the agency to track and certify DYYP transactions, and provided the
27 amounts of water that should be considered “in-lieu” deposits to Watermaster. (*Id.* at ¶ 6.)
28 Watermaster uses information certified by IEUA to account for deposits to and withdrawals from

1 the DYYP storage account, and ultimately to calculate assessments. (*Id.* at ¶ 9.)

2 **B. Watermaster Approval of the FY 2022/2023 Assessment Package**

3 Following the close of the 2021/2022 production year, Watermaster staff distributed water
4 activity reports to all Parties for their review of their water activity – groundwater production,
5 withdrawals of water from storage, placement of water into storage – during production year
6 2021/2022. (Ontario RJN, Exh. 55, p. 2.) Watermaster staff compiled all of this information into
7 its accounting for all such activity during the year. (*Id.*) Watermaster staff then prepared its draft
8 Assessment Package, spreading the FY 2022/2023 budgeted expenses among the Parties based on
9 the directions in the Pooling Plans, Court orders, and agreements among the Parties. (Kavounas
10 Decl. ¶ 10; see Ontario RJN, Exh. 55, pp. 2–3.)

11 Watermaster held Assessment Package Workshops on October 18, 2022 and on
12 November 1, 2022 to present the draft FY 2022/2023 Assessment Package to the Parties and
13 provide them the opportunity to raise questions and concerns, and provide feedback. (Ontario
14 RJN, Exh. 55, p. 3.)

15 Watermaster presented the draft FY 2022/2023 Assessment Package to the Pool
16 Committees for their advice and assistance during their respective November 10, 2022 regular
17 meetings. (*Id.*) During the Appropriative Pool Committee’s November 10, 2022 meeting,
18 representatives from the City of Chino (“Chino”), Monte Vista Water District (“Monte Vista”),
19 and Ontario offered advice that the Board should not adopt the Assessment Package as drafted as
20 it calculated assessments based on the approved FY 2022/23 budget which was the subject of
21 litigation initiated by the same three agencies³; in addition, the Ontario’s representative expressed
22 the City’s continuing opposition to the voluntary withdrawals from MWD’s DYYP storage
23 account not being subject to assessments as another reason for opposing the Assessment Package
24 as presented. (*Id.*) All three parties acknowledged that there were no arithmetic errors in the draft
25 Assessment Package’s computations. (*Id.*) The Overlying (Non-Agricultural) Pool Committee
26 gave the Pool’s representatives discretionary authority to vote at Advisory Committee and Board

27 ³ This was in reference to these parties’ challenge to the Budget’s inclusion of expenses related to
28 the CEQA review of the 2020 Optimum Basin Management Plan. On November 18, 2022, this court denied those parties challenge.

1 meetings subject to changes which they deem necessary. (*Id.*) The Overlying (Agricultural) Pool
2 Committee expressed support for the Assessment Package as then presented. (*Id.*)

3 Watermaster presented the draft FY 2022/2023 Assessment Package at the Advisory
4 Committee's November 17, 2022 meeting for the Committee's advice and assistance. (Kavounas
5 Decl. ¶ 11.) The Advisory Committee recommended approval of the FY 2022/2023 Assessment
6 Package as presented by a vote of 72.141 votes (out of 100) in favor. (*Id.*) Ontario, Chino, and
7 Monte Vista cast dissenting votes. (*Id.*) On November 17, 2022, the Board approved the
8 2022/2023 Assessment Package by a majority vote, with the Board member appointed by Monte
9 Vista Water District voting against. (*Id.* at ¶ 12.) Invoices, generated based on the approved
10 Assessment Package, were then emailed to the Parties. (*Id.*)

11 **III. ARGUMENT**

12 Watermaster properly approved the FY 2022/2023 Assessment Package. As before,
13 Ontario's challenge is essentially to the approval and subsequent implementation of the 2019
14 Letter Agreement signed by Watermaster, IEUA, TVMWD, and MWD.

15 **A. Imported Water Performance Criteria in Exhibit G Do Not Apply to**
16 **Voluntary Withdrawals or "Takes" from MWD's DYYP Account.**

17 Exhibit G to the Dry-Year Yield Agreement, as amended,⁴ includes performance criteria
18 for the benefit of MWD, enabling it to *compel* participating local agencies to pump from the
19 DYYP storage account "in lieu" of receiving imported water deliveries. Exhibit G does not
20 impose any requirements on Watermaster, let alone prescribe how Watermaster must levy
21 production assessments. (See Ontario RJN, Exh. 16, Exh. G.) These conditions are for the benefit
22 of MWD to establish terms under which its water will be recovered.

23 Ontario argues that the 2019 Letter Agreement amended the Dry-Year Yield Agreement
24 and Exhibit G to allow Parties "to pump over the groundwater baseline as defined in Exhibit G,"
25 but "does nothing to amend or modify the imported water criteria contained in Exhibit G."
26 (Motion, p. 11.) This argument, however, assumes that performance criteria in Exhibit G govern

27 ⁴ Exhibit G was deleted and replaced in its entirety by Amendment No. 8 to Groundwater Storage
28 Program Funding Agreement No. 49960, dated January 23, 2015. (See Ontario RJN, Exh. 16, ¶
9.)

1 **voluntary** withdrawals. This is not the case, as Exhibit G explicitly applies **only** to MWD calls
2 that **compel** Parties to withdraw from the DYYP storage account (a “call”) instead of receiving
3 surface deliveries. (Ontario RJN, Exh. 16, Exh. G, p. 1 [“At no time shall a Metropolitan call
4 result in a reduction in imported water deliveries . . .”][emphasis in original]; *id.* at pp. 3–6
5 [examples reference a “call”].) The 2019 Letter Agreement references and incorporates the
6 definition of “groundwater baseline” from Exhibit G, but is not otherwise subject to Exhibit G.
7 Constraining the withdrawal of water by requiring compliance with the imported water baseline
8 in Exhibit G would defeat the entire purpose of establishing a mechanism for voluntary
9 withdrawals.

10 **B. The Assessment Package Properly Accounts for Withdrawals From**
11 **MWD’s DYYP Storage Account.**

12 Watermaster has properly accounted for DYYP-related activities, including voluntary
13 withdrawals, during the life of the DYYP. Critical to understanding Watermaster’s assessment
14 methodology for the DYYP deposits and withdrawals is understanding Watermaster’s role as the
15 accountant for the Chino Basin. This means that Watermaster tracks (and assesses) transfer of
16 water among accounts even when water does not physically leave the Basin. In claiming that all
17 groundwater production must be assessed, Ontario oversimplifies the issue.

18 From an accounting perspective, there is no difference between a Party pumping for its
19 own use and an “in-lieu” deposit into MWD’s DYYP storage account. (Kavounas Decl. ¶ 7.) In
20 both situations, water is leaving a Party’s account, thus triggering Watermaster’s production
21 assessment. (*Id.* at ¶¶ 5, 7.) In the case of wet water recharge deposits, the wet water recharge is
22 not native to the Chino Basin and no Party has any right to the wet water recharge absent
23 additional action. (*Id.* at ¶ 7.) The withdrawal from the DYYP storage account does not cause any
24 water to leave the Chino Basin in an accounting sense because the water in the DYYP storage
25 account is not considered assessable Basin groundwater as it was either recharged imported water
26 (that was not brought to the Basin as replenishment water) or was assessed when deposited “in-
27 lieu” to the DYYP storage account. (*Id.*) While water is withdrawn from the DYYP storage
28 account via physical extraction from the Basin, the water is not considered produced from any

1 Party’s account in the Chino Basin. (*Id.* at ¶ 8.)

2 **1. The Judgment Does Not Include DYYP Withdrawals within the**
3 **Definition of “Production”**

4 Ontario contends that the recovery of stored water is “production” within the meaning of
5 the Judgment. This is false. Nowhere in the Judgment, the Court’s orders, or Watermaster Rules
6 and Regulations does “production” refer to the withdrawal or recovery of supplemental water in a
7 Storage and Recovery Program or the DYYP specifically. “Produce” in the Judgment means “[t]o
8 pump or extract **ground water from Chino Basin.**”⁵ (Judgment ¶¶ 4(q), (s) [emphasis added].)
9 When MWD stores water pursuant to the DYYP, that water is not within an appropriator’s “right”
10 to “produc[e] . . . from the Chino Basin.” (Judgment ¶ 4(c).) The DYYP water belongs to MWD,
11 which as authorized dominion and control, unless and until MWD authorizes its recovery. (See
12 *City of Los Angeles v. City of Glendale* (1943) 23 Cal.2d 68, 76-77; *City of Los Angeles v. City of*
13 *San Fernando* (1975) 14 Cal.3d 199, 260, 261, 264.)

14 Watermaster has neither ignored nor diminished any Party’s rights under the Judgment in
15 assessing production of native water as required and addressing the storing Party’s obligation
16 under the DYYP pursuant to the Peace Agreement section 5.2(c)(ix) and the plenary power of
17 Watermasters to regulate storage of supplemental water by agreement. (Judgment, ¶¶ 11, 12 &
18 14.) *Hi-Desert Cnty. Water Dist. v. Blue Skies Country Club, Inc.* (1994) 23 Cal.App.4th 1723,
19 1737, cited by Ontario, is inapposite as it directly implicated priorities of water rights to safe
20 yield. In short, the dispute arose as to which parties must pay for the cost of importing water to
21 replenish the basin. (23 Cal.App.4th at 1736.) The Court of Appeal opined that the trial court’s
22 determination on bearing the cost of importing *replenishment* water to off-set production had
23 altered the rights of the parties. (*Id.* at 1737.) In the instant case, Watermaster has not altered the
24 rights of any Party inner-se to pump safe yield or to replenish overproduction. Not assessing the
25 withdrawal of imported water stored by MWD for its benefit does not impact the respective water
26 rights of the members of the Appropriative Pool to the Judgment any more than an entity’s

27 ⁵ Ontario’s argument that Watermaster’s decision not to assess withdrawals from the DYYP
28 storage account is inconsistent with the Judgment was raised in Ontario’s Prior Challenge. The
November 3, 2022 Order addressed this issue by illustrating how the Judgment treats native Basin
water and imported or stored water differently.

1 decision to buy more imported water.

2 **2. Watermaster’s Assessment of Production Has Remained Consistent**
3 **Throughout the Life of the DYYP**

4 Ontario claims that “[u]ntil very recently, all water produced in the Basin was assessed
5 consistent with the terms of the Judgment” (Motion, p. 8) and that “Watermaster assessed DYY
6 Program water in production years 2002/03 through 2010/11 during the first cycle of the DYY
7 Program,” but argues that Watermaster did not properly impose assessments for the second cycle
8 of the DYYP in production years 2011/2012 to 2022/2023. (Motion, p. 13; Declaration of
9 Courtney Jones in Support of Ontario’s Motion [“Jones Decl.”] ¶ 50.) This is false.
10 Watermaster’s methodology is unchanged from commencement through the current period.
(Kavounas Decl. ¶ 13.)

11 For the entire duration of the DYYP, neither withdrawals from the DYYP storage account
12 nor wet water recharge deposits have ever been assessed, while “in-lieu” deposits have been
13 assessed. (Kavounas Decl. ¶ 13.) This is apparent on the face of assessment packages spanning
14 the life of the DYYP (FY 2003/2004 to FY 2022/2023), which Ontario included with its Motion.
15 (Ontario RJN, Exhs. 37–53, 56.) From the first DYYP cycle – which Ontario concedes properly
16 assessed DYYP deposits and withdrawals – the FY 2003/2004 assessment package illustrates
17 how “in-lieu” deposits are assessed, the FY 2004/2005 assessment package shows how “in-lieu”
18 deposits are assessed while wet water deposits are not, and FY 2008/2009 assessment package
19 compares the assessment of “in-lieu” deposits with the non-assessment of wet water deposits and
20 withdrawals. Watermaster has applied the same assessment methodology during the second
21 DYYP cycle (FY 2017/2018 to FY 2022/2023). As shown in the data provided by Ontario,
22 Watermaster has never assessed withdrawals or wet water recharge.⁶ (Jones Decl. ¶ 50.)

23 The FY 2022/2023 Assessment Package utilizes a method for assessing DYYP water
24 consistent with the last 19 years of assessment packages. In production year 2021/2022 (FY
25

26 ⁶ The Assessment Package clarifies “[a] DYY in lieu ‘put’ is shown as a positive number and a
27 DYY ‘take’ is shown as a negative number” in the “Storage and Recovery Program(s)” column
28 (column 2K), which is then added to actual production (column 2J) to equal assessable production
(called “Total Production and Exchanges” in column 2L). (Ontario RJN, Exh. 47, Assessment
Package References and Definitions, p. 2.)

1 2022/2023), there were only withdrawals, no deposits, from the DYYP account – thus DYYP
2 withdrawals for use by CVWD and Fontana Water Company (“FWC”) should not have been
3 assessed.⁷ (Kavounas Decl. ¶ 17.) Watermaster did not “suddenly revers[e] course” in the second
4 DYYP cycle after assessing DYYP deposits and withdrawals “consistently” in the first. (Motion,
5 p. 13.) Rather, changes in MWD’s storage patterns drive the change Ontario perceives. DYYP
6 “in-lieu” deposits are assessed at the time the water is transferred into MWD’S DYYP storage
7 account, while wet water recharge deposits are not. (Kavounas Decl. ¶¶ 14, 16–18; Jones Decl. ¶
8 50; see Ontario RJN, Exhs. 37–53, 56.) This practice has not changed during the life of the
9 DYYP. (Kavounas Decl. ¶ 13.) In the second cycle of the DYYP, MWD simply changed its
10 storage patterns. During the second cycle, MWD only recharged the DYYP storage account by
11 wet water, not “in-lieu” deposits, causing different assessment patterns between the first and
12 second cycles of the DYYP. (Kavounas Decl. ¶ 17.)⁸

13 C. **The Time to Challenge the 2019 Letter Agreement and the DYYP**
14 **Operation Thereunder Expired June 20, 2019.**

15 As the Court concluded in its November 3, 2022 Order, and for the reasons set forth
16 therein, the time for Ontario to challenge the validity of the 2019 Letter Agreement and
17 operations thereunder expired on June 20, 2019.

18
19 ⁷ Moreover, in the chart provided in the Jones Declaration, there is no quantity of water shown in
20 the “Water Not Assessed” column for Assessment Year 2022/2023, which is the very year that
21 Ontario challenges for failing to assess. (Jones Decl. ¶ 50.) This is contrary to Ontario’s claims
22 and supports Watermaster’s position that the takes were not improperly “exempt from
23 assessment.”

24 ⁸ Voluntary withdrawals provide additional flexibility to the Parties to the Judgment, but do not
25 provide free, unassessed water. When a Party withdraws water from MWD’s DYYP storage
26 account, the Parties who use the water pay MWD for the water at MWD’s “then applicable full-
27 service rate . . . as if such Stored Water Deliveries were surface water deliveries through its
28 service connection . . . [less] credits for the Operation and Maintenance Costs and the Electrical
Costs associated with the Stored Water Delivery.” (Ontario RJN, Exh. 8 [Dry-Year Yield
Agreement], § VII.D.) Pursuant to the Dry-Year Yield Agreement, MWD compensates
Watermaster for Watermaster’s administration of the DYYP. (Ontario RJN, Exh. 8, § VI.D.3.)
Payment of MWD’s rates will cover MWD’s costs, which include costs associated with the Dry-
Year Yield Agreement. Therefore, in payment of MWD’s rates, CVWD and FWC or any other
Party that voluntarily purchases DYYP water will necessarily pay costs to cover Watermaster’s
expenses for administration of the DYYP. Moreover, pursuant to the Dry-Year Yield Agreement,
MWD contributed up to \$27.5 million for the design and construction of facilities that the Parties
may use for any purpose, so long as the use does not interfere with the DYYP. (Ontario RJN,
Exh. 8, §§ V.A.1; VIII.A.)

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IV. CONCLUSION

Ontario again brings a challenge to the 2019 Letter Agreement masquerading as a motion to attack Watermaster’s FY 2022/2023 Assessment Package. For the reasons set forth in this Court’s November 3, 2022 ruling, the Motion is wrong in its allegation that Watermaster must impose a production assessment on stored supplemental water in the Dry-Year Yield Agreement and is otherwise untimely.

Dated: March 22, 2023

BROWNSTEIN HYATT FARBER SCHRECK, LLP

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CHINO BASIN WATERMASTER

Case No. RCVRS 51010

Chino Basin Municipal Water District v. City of Chino, et al.

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 action within. My business address is Chino Basin Watermaster, 9641 San Bernardino Road, Rancho Cucamonga, California 91730; telephone (909) 484-3888.

On March 22, 2023, I served the following:

1. CHINO BASIN WATERMASTER'S OPPOSITION TO ONTARIO'S MOTION CHALLENGING WATERMASTER'S NOVEMBER 17, 2022 ACTIONS/DECISION TO APPROVE THE FY 2022/2023 ASSESSMENT PACKAGE

/ X / BY MAIL: in said cause, by placing a true copy thereof enclosed with postage thereon fully prepaid, for delivery by the 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.

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See attached service list: Master Email Distribution List

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

Executed on March 22, 2023 in Rancho Cucamonga, California.



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