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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

CHINO BASIN MUNICIPAL WATER DISTRICT,

Plaintiff,

v.

CITY OF CHINO, et al.,

Defendants.

Case No. RCVRS 51010

ASSIGNED FOR ALL PURPOSES TO HONORABLE GILBERT G. OCHOA

CITY OF ONTARIO'S COMBINED REPLY TO OPPOSITIONS TO MOTION CHALLENGING WATERMASTER'S NOVEMBER 17, 2022 ACTIONS/DECISION TO APPROVE FY 2022/2023 ASSESSMENT PACKAGE

Hearing:
Date: April 5, 2023
Time: 9:00 a.m.
Dept: S24
Judge: Gilbert Ochoa

I. INTRODUCTION

In their oppositions, Watermaster and the other Interested Parties[1] accuse Ontario of seeking to rehash arguments that this Court has already denied. That is demonstrably false. As Ontario explained in its Memorandum of Points and Authorities in support of its motion challenging Watermaster's approval of the FY 2022/2023 Assessment Package (the "Memorandum"), two of its three arguments "assume that the 2019 Letter Agreement is *valid and in effect*." (Ontario's Memo. at p. 4 (emphasis added).) In other words, Ontario's primary arguments—that Watermaster's decision to exclude groundwater produced from the Dry Year Yield Program ("DYY Program") storage account (1) is flatly inconsistent with this Court's 1978 Judgment, subsequent court orders, and agreements governing Basin operation, and (2) violates the groundwater performance criteria detailed in Exhibit G to the 2003 Groundwater Storage Program Funding Agreement—do not seek "to invalidate the . . . 2019 letter agreement" (FWC Opp. at p. 2) or call into question this Court's earlier ruling. Instead, Ontario simply asks this Court to reaffirm what should be an uncontroversial proposition: that the 1978 Judgment and subsequent court orders, including Exhibit G (which was approved by court order in 2003 and 2004[2]), govern Basin operations, and that Watermaster cannot exercise its discretion to circumvent the Court's continuing jurisdiction and the requirements of those binding judgments whenever it is convenient to do so.

II. LEGAL ARGUMENT

A. Watermaster's Refusal to Assess DYY Water is Inconsistent With the 1978 Judgment and Subsequent Court Orders.

1. The Judgment and Watermaster Rules and Regulations Require Watermaster to Assess All Water Produced from the Basin.

As Ontario explained in its Memorandum, this Court's 1978 Judgment (the "Judgment") adjudicated rights to groundwater and storage capacity in the Basin. The Judgment provides that the Watermaster "shall have the power to levy assessments against the parties . . . based upon *production*." (RJN, Ex. 1 ¶ 53 (emphasis added).) The Judgment defines "production" to mean

[1] The Interested Parties include the Inland Empire Utilities Agency ("IEUA"), Fontana Water Company ("FWC"), and the Cucamonga Valley Water District ("CVWD").

[2] (See Request for Judicial Notice ("RJN"), filed February 15, 2023, Exs. 8, 15.)

the "[a]nnual quantity, stated in acre feet, of water ***produced***." (*Id.* ¶ 4(s) (emphasis added).) The term "produce," in turn, is defined simply to mean "[t]o pump or extract ground water from Chino Basin." (*Id.* ¶ 4(q).)[3] Taken together, these provisions establish that the Judgment gives Watermaster the authority to levy assessments based on water pumped or extracted from the Basin. The Watermaster's own Rules and Regulations further specify that Watermaster "***shall*** levy assessments against the parties . . . ***based upon Production***." (*Id.*, Ex. 2 at art. IV, § 4.1 (emphases added).) And the Appropriative Pooling Plan—which is also established by the Judgment (see *id.*, Ex. 1 at Ex. H)—provides that "[c]osts of administration of [the Appropriative] pool and its share of general Watermaster expense ***shall be recovered*** by a uniform assessment applicable to ***all production*** during the preceding year."[4] (Declaration of Courtney Jones ("Jones Decl."), filed February 15, 2023, ¶ 42 (emphases added).) Put simply, these governing documents provide that Watermaster must assess all water that is produced from the Basin. In the FY 2022/2023 Assessment Package, however, Watermaster excluded water produced from the Dry Year Yield Program storage account ("DYY water") when calculating the parties' individual assessments. In other words, Watermaster failed to count DYY water as "produced" water for purposes of calculating assessments, in clear contravention of the Judgment and this Court's subsequent orders. Ontario respectfully asks this Court to issue an order directing Watermaster to correct and amend the FY 2022/2023 Assessment Package so that water produced from the DYY Program is assessed, as this Court's binding judgments clearly require. (See generally *Dow v. Lassen Irrigation Co.* (2022) 79 Cal.App.5th 308 [when interpreting a judgment, decree, or other writing, courts will not strain to create an ambiguity where none exists], rehg. den. (June 22, 2022), review den. (Aug. 24, 2022).)

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[3] The Judgment defines "Ground Water" as "[w]ater beneath the surface of the ground and within the zone of saturation, i.e., below the existing water table." (RJN, Ex. 1 ¶ 4(h).) Importantly, this definition does not purport to exclude supplemental water.

[4] The use of the term "shall" in the Watermaster Rules and Regulations conveys a mandatory duty. (RJN, Ex. 2 at art. I, § 1.2(a)(ii) [under Rules of Construction, the terms "'Shall,' 'will,' 'must,' and 'agrees' are each mandatory"]; see *People v. Municipal Court* (1983) 149 Cal.App.3d 951, 954 ["The word 'shall' in ordinary usage means 'must' and is inconsistent with the concept of discretion."].)

Watermaster now argues that assessing DYY water "would be contrary to the objective intent of the parties to the 2019 Letter Agreement." (Watermaster Opp. at pp. 7-8; see IEUA Opp. at p. 3.) If the governing documents said nothing about assessing all water produced, Watermaster might be within its discretion to pick and choose what kind of water to assess. As described above, however, that is not the case. Watermaster's discretion is cabined by the terms of the Judgment and subsequent court orders and agreements, which clearly provide that all water must be assessed, including DYY water. Watermaster is not free to contract its way around those judgments. (See RJN, Ex. 1 ¶ 17 [providing that Watermaster "*shall* perform the duties, as provided in this Judgment or hereafter ordered or authorized by the Court in the exercise of the Court's continuing jurisdiction"]; *id.*, Ex. 2, § 1.5 [providing that Watermaster may amend its Rules and Regulations only by prior approval of Watermaster Advisory Committee].) Indeed, this Court acknowledged as much in 2017 when it rejected Watermaster's unilateral new interpretation of the Court's prior order. The Court explained that "Watermaster is relying on its own interpretation of its own rules and regulations which the court does not accept," and concluded that "Watermaster cannot use its own interpretation of the court's orders to contradict the court's interpretation. The final decision is the court's, not Watermaster's." (Request for Judicial Notice in Support of Combined Reply ("Reply RJN"), filed concurrently, Ex. 58 at 56:14-16.) Because there was no basis in the Judgment or any of the subsequent court orders to support Watermaster's action, the Court denied its attempt to reallocate the relevant water. (*Id.* at 57:27-58:3; see also, e.g., Reply RJN, Ex. 58 at pp. 51-52 [final rulings and orders].) Watermaster's latest attempt to substitute its judgment for that of the Court should meet the same fate.[5] Indeed, if Watermaster and a subset of parties are allowed to circumvent the Judgment and this Court's prior orders by acting outside of the plain language of the Judgment, without formally amending the Judgment, where does it end?

Even setting aside the fact that Watermaster is not free to disregard the requirements of the

[5] Watermaster seems to argue that it has "plenary power"—or absolute power without any limitations—over the regulation of storage of supplemental water. (Watermaster Opp. at 9:13-17.) Not true. Under the terms of the Judgment, this Court retains full, continuing jurisdiction in this case and, further, Watermaster's powers under the Judgment are specifically "[s]ubject to the continuing supervision and control of the Court." (RJN, Ex. 1 ¶¶ 15, 17.)

Judgment and subsequent court orders (i.e., all water produced must be assessed), Watermaster's assertion that assessing DYY water "would be contrary to the objective intent of the parties" is wrong for another reason. This Court has made clear that storage and recovery programs like the DYY Program should be operated in a manner that "provide[s] broad mutual benefits to the parties to the Judgment." (RJN, Ex. 9 at 2:1 [2003 court order]; *id.*, Ex. 15 at pp. 2-3 [2004 court order].) Watermaster's failure to assess any DYY production flouts that directive by shifting costs from CVWD and FWC to other parties, including Ontario. (Jones Decl., ¶ 67.) An agreement that benefits a few parties to the Judgment while costing Ontario and its taxpayers an additional $693,964 cannot be said to "provide broad mutual benefits." (*Ibid.*)

2. The 2003 DYY Program Funding Agreement Explicitly Requires Watermaster to Account for "Produced" DYY Water.

Creatively, Watermaster tries to justify its actions by characterizing water taken from the DYY Program account as a "withdrawal," arguing that the Judgment and subsequent court orders do not define "production" to include "withdrawal" or recovery of supplemental water. (Watermaster Opp. at p. 9.) But Watermaster fails to offer any evidence in support of this bald assertion. Indeed, Watermaster's attempt to insert the new term "withdrawal" as it pertains to the use of water from the DYY Program storage account is in absolute conflict with the plain language of the 2003 DYY Program Funding Agreement that requires Watermaster to account for "***water produced***" from the account. Second, there is no reason to think that the Judgment's broad definition of "production" intended to or did exempt supplemental water, nor is there any evidence in the Judgment or any other binding order suggesting as much. In fact, Watermaster has historically assessed stored supplemental water when produced. (See Jones Decl., ¶ 46 [citing FWC's purchase of City of Fontana's recharged recycled water credit and transfer of 2,722.510 acre feet ("AF") from FWC's local supplemental storage account to its excess carryover storage account, which was then included in FWC's assessable production].)

Watermaster argues that "nowhere . . . does 'production' refer to the withdrawal or recovery of supplemental water in a Storage and Recovery Program or the DYYP specifically."

(Watermaster Opp. at 9:4-6.)[6] To the contrary, the 2003 DYY Program Funding Agreement explicitly requires Watermaster to account for all ***water produced*** from the DYY Program storage accounts:

> **B. Watermaster Obligations**
>
> Watermaster hereby agrees to:
>
> 1. *Maintain records of the amounts of all water stored in* ***and extracted from the Chino Basin*** *pursuant to this Agreement and consistent with the Judgment and Rules and Regulations*, and provide to Metropolitan an amount specified in an account to be designated as the Metropolitan Storage Account. Watermaster will maintain a monthly statement regarding the account as information becomes available and will document in its annual report all water stored in and withdrawn from the Metropolitan Storage Account. Watermaster shall account for Metropolitan stored water as follows:
>
> ....
>
> d. Watermaster shall debit the Metropolitan Storage account one acre-foot for each acre-foot of ***water produced*** from the account. Watermaster accounting for ***water produced*** from the Metropolitan Storage Account shall specify the ***quantities produced by each Operating Party***.

(RJN, Ex. 8 at pp. 15-16 (emphases added).)[7] Watermaster is charged with accounting for all DYY water that is produced. Watermaster also is required to assess all water that is produced. In failing to assess DYY water produced by Interested Parties FWC and CVWD, Watermaster is in violation of the Judgment, Watermaster Rules and Regulations, and the terms of the 2003 DYY Program Funding Agreement that was adopted by order of this Court. (*Id.*, Ex. 1 ¶ 53, Ex. 2 at art. IV, § 4.1, Ex. 9.) This includes Watermaster's violation of the Appropriative Pooling Plan—which is also established by the Judgment—providing that "[c]osts of administration of [the Appropriative] pool and its share of general Watermaster expense ***shall be*** recovered by a uniform assessment applicable to all production during the preceding year." (Declaration of Courtney Jones ("Jones

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[6] Watermaster then goes on to describe its accounting obligation, including an obligation to "account for deposits and withdrawals from the DYYP storage account." (Watermaster Opp. at 8:22-9:1; Declaration of Peter Kavounas, ¶ 9.)

[7] Notably, the 2003 DYY Program Funding Agreement refers to both "water produced" and to "water extracted from the Chino Basin", and the Judgment, in turn, defines "produce" to mean "[t]o pump or extract ground water from Chino Basin." (RJN, Ex. 1 at ¶ 4(q).)

Decl."), filed February 15, 2023, ¶ 42 (emphases added).) No amount of "discretion" excuses Watermaster's failure to abide by the Judgment and the orders of this Court.

Finally, Watermaster insists that its assessment of production has remained consistent and that "withdrawals" of DYY water have never been assessed while "in-lieu" deposits have been. (Watermaster Opp. at p. 10.) Put simply, Watermaster is inventing a term ("withdrawal") that neither the Judgment, nor subsequent court orders, nor the 2019 letter agreement defines to avoid calling a spade a spade. But Watermaster cannot slap a new label on DYY water to avoid assessing it.[8] The Court should not accept this attempted sleight of hand. There is no practical difference between water that is "produced" and water that is "withdrawn." Under the plain terms of the Judgment, the Watermaster Rules and Regulations, and the DYY Program Funding Agreement, DYY water is produced and must be assessed. Further, there is nothing in those orders or, for that matter, in the 2019 letter agreement, that differentiates between DYY water that goes into the Metropolitan Water District ("MWD" or "Metropolitan") storage account as in-lieu water and DYY water that goes into the MWD storage account through wet water recharge. The DYY Program Funding Agreement simply looks to "water produced from the Metropolitan Storage Account" and the "quantities produced by each Operating Party" and under the Judgment and Watermaster Rules and Regulations, that produced water is assessed. (RJN, Ex. 8 § C.1.d.)

The Judgment is interpreted like a contract to effectuate the mutual intention of the stipulating parties, and the authority of a watermaster is prescribed and defined by that governing agreement and the Court's subsequent orders. (*Rancho Pauma Mutual Water Co. v. Yuima Municipal Water Dist.* (2015) 239 Cal.App.4th 109; *Orange Cove Irrigation Dist. v. Los Molinos Mutual Water Co.* (2018) 30 CalApp.5th 1, 21-22; RJN, Ex. 1 ¶ 17.) Allowing Watermaster to make up terms, which are not defined by the Judgment or its prior Orders, in order to achieve its preferred ends of exempting certain categories of water from assessment would erode the parties' ability to rely on the integrity and enforceability of the Judgment and subsequent court orders.

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[8] As Ontario explained in its Memorandum, the Judgment distinguishes between native groundwater, stored groundwater, and supplemental water for some purposes, but not in the provisions governing assessment. Accordingly, any such distinctions have no bearing on the requirement that Watermaster assess all water produced. (Memo. at pp. 12-13.)

1. Ontario's Challenge is Timely.

In making the above arguments, and the below argument concerning the Exhibit G performance criteria, Ontario challenges the failure of Watermaster to assess DYY production in violation of the Judgment and this Court's prior orders. These claims are timely, and Ontario's parallel challenge relating to the 2019 letter agreement, detailed below in section II.C., does not bar this separate challenge of the FY 2022/2023 Assessment Package.[9] As it pertains to assessments that violate the terms of the Judgment and orders entered in this adjudication, a new limitation period commences from each unauthorized and unlawful assessment. (*See Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 824 [city's allegedly illegal actions included not only the ordinance's initial enactment but also the continued collection of an unapproved tax].)

C. Watermaster Did Not Comply With the Performance Criteria for the DYY Program Detailed in Exhibit G.

Participants in the DYY Program must comply with certain performance criteria, which are detailed in Exhibit G to the 2003 Groundwater Storage Program Funding Agreement (and which this Court approved in 2003). (Declaration of Courtney Jones in Support of Combined Reply, filed concurrently, ¶ 4, Ex. 1; see also RJN, Ex. 8 at Ex. G.) As Ontario described in its Memorandum, the DYY Program allows a party to import water directly from Metropolitan rather than pumping groundwater locally. The DYY Program and its implementing orders and agreements ensure that the ledger is balanced: a party that imports 100 acre feet of water from Metropolitan must forgo pumping the same amount (100 acre feet) of groundwater. This fundamental requirement remains in effect—participants in the DYY Program must roll off from imported water supplies and onto groundwater production and may only claim a DYY credit that is equal to their shift off of their use of imported water and onto DYY Program groundwater in any one year. (Jones Decl., ¶¶ 9-14.) Here, however, Watermaster did not require CVWD and FWC to comply with the Exhibit G performance criteria. Instead, Watermaster allowed CVWD to reduce its use of imported water by

[9] To be clear, Ontario also continues to assert, including on appeal, that its challenge to the 2019 letter agreement and its challenges to both the 2021/2022 and 2022/2023 assessment packages are timely.

13,915 acre-feet but simultaneously pump 17,912 AF of Metropolitan groundwater. This resulted in an imbalance of the difference (4,197 AF), which Exhibit G does not permit and which, because of Watermaster's mistaken understanding of the scope of its discretion under the Judgment (see *supra*), meant that Watermaster did not assess this water. Watermaster also allowed FWC—which is not a party to a local agency agreement and was therefore not entitled to claim *any* DYY water—to do the same, resulting in an imbalance of 5,000 AF and a similarly dramatic underpayment of production assessments by FWC. (Jones Decl., ¶¶ 17, 66.)

Watermaster and IEUA contend that Exhibit G only imposes restrictions to mandatory production from the Basin. In other words, in their view, Exhibit G is inapplicable to "voluntary" withdrawals. (Watermaster Opp. at pp. 7-8; EUA Opp. at p. 3.) This argument ignores the fundamental purpose of the 2019 letter agreement, which was to ensure that MWD did not leave water in the storage account by allowing parties to voluntarily pump above the groundwater baseline established in Exhibit G. (FWC Opp. at 2:23-27.) Put another way, both can be true: you can allow a party to voluntarily produce more DYY water under the 2019 letter agreement *and* require the same party to continue to abide by Exhibit G's requirement that the party roll off of imported water supplies in an amount equal to its DYY production. Watermaster argues that it would be contrary to the intent behind the authorization of voluntary withdrawals "only to maintain the restrictive criteria in Exhibit G that would severely inhibit withdrawals." (Watermaster Opp. at 4:26-5:2.) However, Watermaster cites to no evidence to support the conclusion that requiring parties to abide by Exhibit G would have had such a cooling effect.

Watermaster also asserts that Exhibit G does not impose any requirements on Watermaster or prescribe how Watermaster must levy production. (Watermaster Opp. at p. 7; see also FWC Opp. at p. 5.) The failure of Watermaster to enforce the Exhibit G performance criteria exacerbates the injury to Ontario by allowing parties to overclaim their DYY production and shift additional financial burdens to other parties, including Ontario. (Jones Decl., ¶ 58.) Further, given the fact that all DYY program documents, including the Court's DYY Orders and Exhibit G, are silent on assessments, Watermaster must refer to its base governing document, the Judgment, on this issue.

Finally, Watermaster contends that "the 2019 Letter agreement references and incorporates the definition of 'groundwater baseline' from Exhibit G, but is not otherwise subject to Exhibit G." (Watermaster Opp. at p. 8.) There is nothing in the 2019 letter agreement that exempts parties from the Exhibit G performance criteria, and nothing in the 2019 letter agreement that states that Exhibit G criteria would only be applied to mandatory calls and would not apply to a voluntary withdrawal. Particularly in the absence of any such language in the 2019 letter agreement, the default is that Watermaster, each year as it performs its accounting associated with the DYY Program, must ensure that parties comply with the orders of this Court, which orders include Exhibit G.

The Exhibit G performance criteria include specific requirements for the reduction of imported water deliveries and corresponding increases in groundwater pumping, such that an agency can only claim DYY credit equal to its shift off of imported water. Importantly, Exhibit G is part of this Court's prior orders. (Jones Decl., ¶ 14.) Those orders remain unchanged, even after the 2019 letter agreement.[10] Accordingly, in failing to require CVWD and FWC to comply with the Exhibit G performance criteria in production year 2021/2022 (which corresponds to the 2022/2023 assessment year), Watermaster failed to discharge its duties and responsibilities as an arm of this Court to exercise its duties "as provided in this Judgment or hereafter ordered or authorized by the Court." (RJN, Ex. 1 ¶ 17.) The result of Watermaster's failure is the shifting of an increased financial burden and injury to Ontario. (Jones Decl., ¶ 68.)

D. Watermaster Failed to Provide Notice Regarding the 2019 Letter Agreement and Failed to Comply with the Mandatory Watermaster Approval Process.

The 2019 letter agreement was not approved through the mandatory Watermaster approval process, nor was notice of the proposed changes provided to all parties as the Judgment requires. (See Jones Decl., ¶¶ 20, 33.) As this Court is aware, this issue is now pending on appeal. Ontario hereby reserves and reasserts its arguments challenging the validity of the 2019 letter agreement.

[10] If Watermaster or other Interested Parties wanted to exempt "voluntary" DYY production from the Exhibit G performance criteria, they could have done so through a formal amendment to Exhibit G. Indeed, Exhibit G was amended once before, in 2015, after being approved through the formal Watermaster process. (RJN, Ex. 16.)

(See Combined Reply at pp. 28-33 [RJN, Ex. 57].) Ontario further asserts that its challenge to the 2019 letter agreement was timely for the reasons stated in its Combined Reply in support of its challenge to Watermaster's approval of the FY 2021/2022 Assessment Package. (*Id.* at pp. 37-40.)

III. CONCLUSION

For the foregoing reasons, Ontario respectfully requests that this Court issue an order: (1) directing Watermaster to implement the DYY Program in a manner consistent with the Judgment and court orders, including both as it relates to the assessment of groundwater production and compliance with the Exhibit G performance criteria; (2) directing Watermaster to comply with the Watermaster approval process as it pertains to the DYY Program and any proposed amendments thereto; (3) correcting and amending the FY 2022/2023 Assessment Package to assess water produced from the DYY Program; and (4) invalidating the 2019 letter agreement.

Dated: March 28, 2023

STOEL RIVES 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 28, 2023, I served the following:

1. CITY OF ONTARIO'S COMBINED REPLY TO OPPOSITIONS TO MOTION CHALLENGING WATERMASTER'S NOVEMBER 17, 2022 ACTIONS/DECISION TO APPROVE 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 28, 2023 in Rancho Cucamonga, California.

AMoore

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