

Transcript of Proceedings  
August 04, 2023

Chino Basin Municipal Water District  
vs.  
City of Chino



Transcript of Proceedings

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SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN BERNARDINO

CHINO BASIN MUNICIPAL WATER DISTRICT, )  
 )  
Plaintiff, )  
 )  
vs. ) CASE NO. RCVRS51010  
 )  
CITY OF CHINO, et al., )  
 )  
Defendants. )

REPORTER'S TRANSCRIPT OF ORAL PROCEEDINGS

Before Hon. Gilbert Ochoa, Judge

Department S-24  
San Bernardino, California

Friday, August 4, 2023  
Job No. 10124489

APPEARANCES:

FOR MONTE VISTA: KIDMAN GAGEN LAW  
BY: ANDREW GAGEN  
Attorney at Law

FOR WATERMASTER: BROWNSTEIN HYATT FARBER  
SCHRECK  
BY: SCOTT SLATER  
and  
BRADLEY HERREMA  
Attorneys at Law

FOR THE NON-AGRICULTURAL POOL: LOEB & LOEB, LLP  
BY: ALLEN W. HUBSCH  
Attorney at Law

FOR THE THREE VALLEYS MUNICIPAL WATER DISTRICT: BRUNICK, McELHANEY & KENNEDY  
BY: STEVEN M. KENNEDY  
Attorney at Law

Transcript of Proceedings

1 APPEARANCES: (CONTINUED)

2 FOR THE CITY OF ONTARIO: STOEL RIVES  
3 BY: ELIZABETH EWENS  
Attorney at Law

4 FOR THE AGRICULTURAL POOL: EGOSCUE LAW GROUP, INC.  
5 BY: TRACY J. EGOSCUE  
Attorney at Law

6 FOR INLAND EMPIRE UTILITIES AGENCY: JC LAW FIRM  
7 BY: JEAN CIHIGOYENETCHE  
and  
8 MARTIN CIHIGOYENETCHE  
Attorneys at Law

9 FOR FONTANA WATER COMPANY and CUCAMONGA VALLEY WATER DISTRICT: LAGERLOG, SENEAL, GOSNEY & KRUSE, LLP  
10 BY: THOMAS S. BUNN  
Attorney at Law

11 FOR CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION: CALIFORNIA DEPARTMENT OF JUSTICE  
12 BY: CAROL Z. BOYD  
13 and  
14 MARILYN LEVINE  
Deputy Attorneys

15 FOR JURUPA COMMUNITY SERVICES: ELLISON, SCHNEIDER, HARRIS & DONLAN  
16 BY: SHAWNDA M. GRADY  
Attorney at Law

17 FOR THE APPROPRIATIVE POOL COMMITTEE: LAW OFFICE OF JOHN J. SCHATZ  
18 BY: JOHN J. SCHATZ  
Attorney at Law

19

20 FOR THE CITY OF CHINO HILLS: HENSLEY LAW GROUP  
21 BY: ELIZABETH CALCIANO  
Attorney at Law

22 Reported by: ROCIO GONZALEZ  
23 Official Reporter Pro Tem  
C.S.R. No. 10911

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Transcript of Proceedings

1 SAN BERNARDINO, CALIFORNIA, FRIDAY, AUGUST 4, 2023

2 10:04 A.M.

3 DEPARTMENT S-24

HON. GILBERT OCHOA, JUDGE

4 APPEARANCES:

5 ANDREW GAGEN, Attorney at Law, representing  
6 MONTE VISTA via Zoom Conference; SCOTT SLATER and  
7 BRADLEY HERREMA, Attorneys at Law, representing  
8 CHINO BASIN WATERMASTER via Zoom Conference;  
9 ALLEN HUBSCH, Attorney at Law, representing  
10 NON-AGRICULTURAL POOL via Zoom Conference;  
11 STEVEN M. KENNEDY, Attorney at Law,  
12 representing THREE VALLEYS MUNICIPAL WATER  
13 DISTRICT via Zoom Conference; ELIZABETH EWENS,  
14 Attorney at Law, representing CITY OF ONTARIO;  
15 TRACY J. EGOSCUE, Attorney at Law, representing  
16 AGRICULTURAL POOL; MARTIN CIHIGOYENETCHE and  
17 JEAN CIHIGOYENETCHE, Attorneys at Law,  
18 representing INLAND EMPIRE UTILITIES AGENCY  
19 via Zoom Conference; THOMAS S. BUNN, Attorney at  
20 Law, representing FONTANA WATER COMPANY and  
21 CUCAMONGA VALLEY WATER DISTRICT; SHAWNDA M.  
22 GRADY, Attorney at Law, representing JURUPA  
23 COMMUNITY SERVICES via Zoom Conference; JOHN J.  
24 SCHATZ, Attorney at Law, representing the  
25 APPROPRIATIVE POOL COMMITTEE; ELIZABETH CALCIANO,  
26 Attorney at Law, via Zoom Conference,

Transcript of Proceedings

1 representing CITY OF CHINO HILLS; CAROL Z. BOYD  
2 and MARILYN LEVINE, Deputy Attorneys,  
3 representing the STATE OF CALIFORNIA via Zoom  
4 Conference.  
5 (Rocio Gonzalez, Official Reporter Pro Tem,  
6 CSR No. 10911.)

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8  
9 THE COURT: Chino Basin Watermaster case. So  
10 everybody could step forward and give their appearances. If we  
11 could start out with the moving party giving their appearance  
12 first. And then the respondents. And then everybody else.

13 And this time, to maybe get some type of order, after  
14 the respondents have given their appearance, maybe everybody  
15 can go by just alphabetical order, just roughly. And hopefully  
16 that will prevent people from talking over each other. Okay.

17 So we'll begin with City of Ontario. Make your  
18 appearance.

19 MS. EWENS: Thank you, your Honor. Elizabeth Ewens of  
20 Stoel Rives here for City of Ontario.

21 THE COURT: And Respondents?

22 MR. BUNN: Good morning, your Honor. Thomas Bunn for  
23 the respondents, Fontana Water Company and Cucamonga Valley  
24 Water District.

25 MS. CALCIANO: Good morning, your Honor. Elizabeth  
26 Calciano, City of Chino Hills.

Transcript of Proceedings

1 MR. J. CIHIGOYENETCHE: Good morning, your Honor.  
2 Jean Cihigoyenetcche on behalf of Inland Empire Utilities Agency  
3 on Zoom.

4 MR. SLATER: Scott Slater on CourtCall -- Chino Basin  
5 Watermaster.

6 MR. GAGEN: Andrew Gagen on behalf of Monte Vista  
7 Water District and Monte Vista Irrigation Company.

8 MR. HUBSCH: Good morning, your Honor. Allen Hubsch  
9 on behalf of the Non-agricultural Pool Committee.

10 MR. KENNEDY: Good morning, your Honor. Steve Kennedy  
11 on behalf of Three Valley Municipal Water District.

12 MS. GRADY: Good morning, your Honor. Shawnda Grady  
13 on behalf of Jurupa Community Services District.

14 MR. SCHATZ: Good morning, your Honor. John Schatz on  
15 behalf of Appropriative Pool.

16 MR. HERREMA: Good morning, your Honor. Brad Herrema  
17 also on behalf of Chino Basin Watermaster.

18 MS. EGOSCUE: Good morning, your Honor. Tracy Egoscue  
19 on behalf of the Agricultural Pool.

20 MR. M. CIHIGOYENETCHE: Good morning, your Honor.  
21 Martin Cihigoyenetcche on behalf of Inland Empire Utilities  
22 Agency as well.

23 MS. BOYD: Good morning, your Honor. Deputy Attorney  
24 General Carol Boyd on behalf of the State of California as a  
25 member of the Agricultural Pool.

26 MS. LEVINE: Good morning, your Honor. Marilyn Levine

Transcript of Proceedings

1 as a member of the Agricultural Pool, State of California,  
2 Deputy Attorney General.

3 THE COURT: Anyone else?

4 (No audible response.)

5 THE COURT: All right. Hearing no one else, I'm going  
6 to go ahead and begin. I'm going to start with the motion  
7 regarding the site visit by the watermaster. I believe  
8 Mr. Slater is the moving party on that. There was no  
9 opposition. The Court is going to grant it. I just have a  
10 couple of questions.

11 So on Page 6 you have indicated 13 different areas for  
12 visit, and I was just wondering if you thought it was  
13 reasonable to try to accomplish all of that in one day since  
14 some of these sites are pretty large. Do you think that's  
15 doable, Mr. Slater?

16 MR. SLATER: Yes, your Honor, we think it is. It's a  
17 crisp schedule. We think we've mapped it out. We've actually  
18 driven it, and we think we can accomplish it within this  
19 time.

20 However, your Honor, if the discussion and viewing is  
21 such that we need to continue it, we can accommodate that at a  
22 later -- at a later time. I think the schedule is known and  
23 understood, and we want your Honor to make the most of the  
24 time. But we think we can get in within this period.

25 THE COURT: Well, so for just, for instance, the  
26 San Sevaine Basins, which are a number of recharge basins,

Transcript of Proceedings

1 that's a pretty large area. What do you envision happening  
2 there? Are we just going to do a drive-by? Are we going to  
3 get out and walk the basins? What do you anticipate happening?

4 MR. SLATER: Yeah. I think, your Honor, in each of  
5 the instances there will be an opportunity to exit the van.  
6 And we're not intending that you would walk the entirety of the  
7 site but that you would be able to view what is going on from a  
8 standing location, and in some instances we will not leave the  
9 van. So it will be dependent on each site. But we will have  
10 the capability of exiting the van if you want to do that.

11 The recording devices will follow you as we go out.  
12 We'll have recording devices on all of the people who are  
13 attending.

14 THE COURT: Okay. I notice on the order you left the  
15 date open. Have the parties talked about a particular date?  
16 Because, obviously, the Court has things scheduled, as you  
17 know, well in advance. So to the extent that we would have to  
18 continue anything, I'm just wondering what dates you folks have  
19 thought about doing this?

20 MR. SLATER: So, your Honor, I think the most -- yeah.  
21 The most important person on this visit is, of course, you. We  
22 have two critical attendees, which would be Peter Cabbiness and  
23 Amy Malone, who are responsible for the narrative. And what we  
24 thought, your Honor, is if you could offer us prospective dates  
25 that will be acceptable, we'll match up with your dates.

26 And then the pool representatives will be designated



Transcript of Proceedings

1 by the pool, so there's a little bit of flexibility in who  
2 they've selected to be the observers.

3 THE COURT: Okay. All right. So would it be okay if  
4 I just kind of spoke with my clerk and just kind of look at my  
5 calendar, see what dates are good for us. And then my clerk  
6 could coordinate with you, Mr. Slater, those dates and you can  
7 coordinate with the rest of the parties, or the rest of the  
8 folks that will be there.

9 MR. SLATER: Yes, your Honor. I think that we would  
10 start that way, and then when we settle in on the dates, we  
11 will provide notice to all the parties.

12 THE COURT: Okay. Great. Then we will get a couple  
13 of dates out to you by close of business today.

14 Any other input on that motion? I know there was no  
15 opposition, but anyone else wish to be heard?

16 MR. SLATER: Your Honor, I do have one piece of  
17 housekeeping.

18 THE COURT: Yes.

19 MR. SLATER: There is a -- attached to my declaration,  
20 Exhibit B, includes the slide depictions of the locations we're  
21 going to see. We have no change in the locations, but we plan  
22 to offer to file with you today a change in exhibit -- or  
23 sorry, Page 5 of Exhibit B, it has been vetted with all the  
24 parties initially before the filing, and again yesterday.  
25 There's no concern. It doesn't change the site. It just  
26 changes the labeling to be a little more specific.

Transcript of Proceedings

1           So we would intend to file that with you today. And  
2 then we have nothing further on this.

3           THE COURT: Okay. You also mentioned the motion,  
4 there was some additional program materials. I didn't know if  
5 you were just referencing Exhibit B or there's some additional  
6 materials you want the Court to review beforehand?

7           MR. SLATER: At this juncture there is not, your  
8 Honor. We are all satisfied with the materials and the  
9 narratives as controlled by the stipulation is -- is where we  
10 all are in terms of comfort level. So we're not planning to  
11 file anything additional.

12           Of course, your Honor, you have annual reports that  
13 you have read and have been available to you. So your general  
14 knowledge, which is already pretty considerable, will be  
15 helpful. And other than that, we think we're good to go.

16           THE COURT: Okay. The motion is granted. And the  
17 only thing left really for the Court to do is fill in the date.  
18 And again, I'll get some dates to Mr. Slater on that.

19           And that's that. Mr. Slater to give notice of that  
20 information as soon as we give it to him.

21           MR. SLATER: Thank you, your Honor.

22           THE COURT: As to Ontario's motion, everybody has had  
23 an opportunity to, I guess, reread the Court's tentative at  
24 this point?

25           MS. EWENS: We have, your Honor.

26           THE COURT: Obviously, the tentative has not changed.

Transcript of Proceedings

1 Counsel, would you like to be heard?

2 MS. EWENS: Yes, please. And, your Honor, this has  
3 obviously been very thoroughly briefed with a hefty amount of  
4 paper, so I don't want to belabor what's already before the  
5 Court.

6 But there are three points from your tentative that we  
7 would like to address, if we could.

8 The first is this. The City understands the Court's  
9 ruling to be based on a determination that native groundwater  
10 is assessed and stored. Groundwater is not. And for the  
11 Court's reference here, I'm referring most especially to Page 8  
12 of the Court's order, where the Court finds, quote, By  
13 definition, groundwater, the category of water subject to  
14 assessment, does not include stored water and supplemental  
15 water, the categories of water that are part of DYY.

16 Here, we believe it is important to go back to the  
17 plain language of the judgment. There are two relevant defined  
18 terms in the judgment. One, explicitly excludes stored water  
19 from its definition. The other defined term in the judgment  
20 does not.

21 Here, I'm referring to judgment Paragraph 4-D, which  
22 defines basin water as follows -- and I apologize. It defines  
23 basin water. At the end of the definition it says, "Said term  
24 does not include stored water."

25 So when drafting the original judgment, and parties at  
26 the time were part of this, the Court specifically found that

Transcript of Proceedings

1 basin water, again, does not include stored water.

2           Six lines down from that in the judgment, groundwater  
3 is defined. And it's absolutely silent as to whether it  
4 includes or excludes stored water. And that's significant. If  
5 the Court, at the time of drafting the judgment, meant to  
6 exclude stored or supplemental water from the definition of  
7 groundwater, it would have done so. Instead, the judgment  
8 defines groundwater in the broadest possible terms. It is  
9 water beneath the surface of the ground and within the zone of  
10 saturation.

11           And that is the operative definition that we are  
12 dealing with now. It is the broad inclusive term groundwater.

13           Consistent with that, the Court's order that limits  
14 production to assessments of native water also ignores the fact  
15 that other supplemental water historically has been assessed.  
16 Here, I'm talking most especially about recycled water.

17           In the interest of time, I would direct the Court's  
18 attention to Exhibit 53, which is the assessment package,  
19 including at Page 14.1, where it identifies 2722.5 acre feet of  
20 water for Fontana. That is a transfer to and from the ECO  
21 account.

22           Following that, Page 11.1 of the assessment package,  
23 where that same 2722 acre feet of water is identified with  
24 respect to supplemental storage.

25           And at Page 12.1, where that same 2722.5 acre feet of  
26 water is identified as part of the recycled water account and

Transcript of Proceedings

1 is assessed.

2           So consistent with this broad definition of  
3 groundwater that does not exclude stored water, historically  
4 the watermaster practice has been to assess stored groundwater.  
5 The Court's proposed finding in the tentative effectively would  
6 put that on its head. And from now forward, stored water,  
7 supplemental water, would be excluded both from the definition  
8 of groundwater and excluded from assess -- assessments.

9           Ontario does not believe that was the intent of the  
10 judgment. Ontario submits that it was not consistent; this  
11 order would not be consistent with the watermaster historical  
12 practice. And to be very clear, the City of Ontario holds a  
13 significant amount of recycled water. And so if this becomes  
14 the final order, it is Ontario's position that the watermaster,  
15 consistent with the Court's final order, should treat the  
16 production of that recycled water as not assessable under this  
17 new -- this new order that the Court has proposed.

18           The second issue that we'd like to address from the  
19 Court's tentative has to do with the terms withdrawal and  
20 produced. And to be clear, we're not suggesting that the term  
21 withdrawal has never appeared in any document at any time over  
22 the almost 50-year history of this case. But like the  
23 definition of basin water and groundwater, it's a defined term.  
24 It has a specific meaning and has a specific use relative to  
25 the DYY program.

26           Under the DYY program funding agreement, it requires

Transcript of Proceedings

1 the watermaster to account for the produced DYY water, not the  
2 withdrawn DYY water, the produced DYY water.

3           Specifically it says, "Watermaster shall debit  
4 Metropolitan Storage Account one acre foot per each one acre  
5 foot of water produced from the account. Watermaster  
6 accounting for water produced from the Metropolitan Storage  
7 Account shall specify the quantities produced by each operating  
8 party." Specific to the DYY program, it is production not  
9 withdrawal that is used as part of the Court's order in place  
10 for this program.

11           It's significant because then if you go back again to  
12 the overall guidance document that, you know, is the umbrella  
13 under which the Chino Basin lives, the judgment, it's  
14 production that's assessed. So if you look at the 1978  
15 judgment, Provision 53, Watermaster shall have the power to  
16 levee assessments against the parties based on production.

17           Paragraph 4-S, Production is the annual quantity  
18 stated in acre feet of water produced.

19           Section 4-Q, produced water means to pump or extract  
20 groundwater from the Chino Basin.

21           And here, going back to the beginning, it's important  
22 and critical that the term used was groundwater. It wasn't  
23 basin water. Had the Court, in the judgment, intended it to be  
24 product -- produced to encompass only basin water, it would  
25 have used the word basin water. It didn't. It used the broad  
26 inclusive groundwater. Produced means to pump or extract

Transcript of Proceedings

1 groundwater from the Chino Basin.

2 Continuing. The Watermaster Rules and Regulations,  
3 Article 4, Section 4.1, Watermaster shall levy assessments  
4 against the parties based on production, not withdrawal.

5 The appropriate pooling plan, which is appended to the  
6 judgment as Exhibit 8 says, quote, "Cost of administration, the  
7 appropriate pool -- that's additive -- and its share of the  
8 general watermaster expense shall be recovered by a uniform  
9 assessment applicable to all production during the preceding  
10 year." Uses the word production. It's a term of art. It has  
11 meaning within this judgment, and it has meaning within the  
12 history of this case. All groundwater produced is assessed.

13 THE COURT: Could you tell me that paragraph again?

14 MS. EWENS: It is Exhibit H to the judgment. And I  
15 apologize, I wrote down the quote and did not provide a jump  
16 cite, but I'm happy to provide that to the Court after the  
17 hearing by written notice if the Court would desire.

18 THE COURT: Yes. Thank you.

19 MS. EWENS: Okay.

20 The third portion of the tentative that I would like  
21 to address with the Court is the Court's definition of  
22 operating parties. So on Page 3, the Court states that  
23 operating parties have entered into a local agency agreement.  
24 Fontana has not entered into a local agency agreement.

25 At Page 4 of the Court's tentative, the Court found  
26 the various individual local agency agreements contemplated in

Transcript of Proceedings

1 the DYY funding agreement were executed between IEUA and Three  
2 Valleys and all of the operating parties in 2003.

3           Again, with respect to Fontana, this is not accurate.  
4 Fontana does not meet the Court's definition of an operating  
5 party. Fontana does not handle a local agency agreement. And  
6 to be a qualified participant in this program, pursuant to the  
7 Court's order in 2004, you have to have a local agency  
8 agreement. There is nothing in the watermaster's discretionary  
9 authority that can exempt a party from that fundamental  
10 requirement.

11           And the precedent there is considerable. Because if  
12 you allow parties to voluntarily opt in and opt out of a  
13 program, it will frankly cause chaos. There's a reason you  
14 have to have a local agency agreement. There's a reason why  
15 you have to have standards about how this program is going to  
16 be utilized. It's for the preservation of the basin, and it's  
17 to make sure that parties like the City of Ontario are not  
18 materially injured by folks who are opting in.

19           At issue today is the financial impact on the City of  
20 Ontario and it's considerable. Cumulatively, it's tens of  
21 thousands of dollars. Over a period of years, it is  
22 potentially millions of dollars if folks are allowed to skirt  
23 their obligation to pay assessments on produced groundwater,  
24 and if they're able to opt in and opt out of programs for their  
25 own personal gain and for the communities they represent, and  
26 the literal expense of the City of Ontario and the people it



Transcript of Proceedings

1 represents who have to shoulder the extra burden.

2           Fundamentally, what we would submit is the issue is  
3 this, the watermaster's position that's been adopted by the  
4 Court in its tentative is effectively an end run around the  
5 judgment and the rules that have been in place for years that  
6 folks in this basin rely on to safeguard their rights and  
7 interests and to safeguard the basin.

8           If watermaster or any party intended to change the  
9 definition of groundwater to exclude stored water or explicitly  
10 exclude supplemental water, there's a process to do that. But  
11 it involves going to pooling committees and advisory committees  
12 and coming back to the court to request a formal amendment.  
13 It's not done through briefing. It's not done through a letter  
14 agreement.

15           We have to rely on the durability of a judgment that's  
16 been in place since 1978. This judgment has outlived other  
17 attorneys, it will likely outlive me. And for the folks that  
18 come after us, we have to rely on something. And that's the  
19 judgment, the Court's 2003 order, the Court's 2004 order, and  
20 orders that, your Honor, now that the case has been assigned to  
21 you, will issue now and in the future. Because of we can't  
22 rely on that, the whole thing falls down.

23           And on that point, watermaster has suggested that it  
24 has discretionary or plenary authority to modify the rules, to  
25 fit conditions of the basin, or the needs of a particular  
26 project. Undoubtedly under the judgment and the watermaster

Transcript of Proceedings

1 rules, there is a great deal of discretion that is given to the  
2 watermaster; that there is a checks and balances process that's  
3 in place. The watermaster does not have unfettered authority.  
4 Does not have the authority to rewrite the Court's order from  
5 2003 and 2004. And certainly does not have the authority to  
6 rewrite provisions in the judgment.

7 And again, the judgment is very clear on this. If you  
8 look to the judgment in Paragraphs 15, 16, 17, and 40 in  
9 particular, there are specific checks, based on the Court's  
10 ongoing jurisdiction and authority in the case, over the  
11 watermaster's conduct. You're the check and balance to make  
12 sure that watermaster does not step out of line and that  
13 there's a forum for parties to go to if there's concerns.  
14 That's why we're standing here today.

15 The watermaster does not have plenary authority to  
16 rewrite the Court's orders, and that's effectively what's  
17 happening in this case. For that reason, we request that the  
18 Court amend its order and rule in the City of Ontario's favor.  
19 And to ensure the DYY groundwater production is assessed now  
20 and in the future.

21 Thank you.

22 THE COURT: So if the Court follows through with the  
23 tentative and it becomes the ruling, my takeaway from your  
24 argument is that it would just be chaos, contrary to historical  
25 precedent, kind of almost unwinding the whole system that  
26 everybody has been relying on. Am I correct in that?

Transcript of Proceedings

1 MS. EWENS: It unwinds the financial assurances about  
2 how water is assessed. So, you know, is it going to have  
3 impact on every aspect of basin management? Absolutely not.  
4 But the City of Ontario, as do other public agencies, rely on  
5 their budgeting process and their planning process and their  
6 use of their water. The financial calculations.

7 THE COURT: You said you stand to benefit essentially  
8 by the Court's ruling, because as you indicated, 75 percent of  
9 Ontario's water is recycled water, which you believe should be  
10 assessed, correct?

11 MS. EWENS: If this order stands and if in the future  
12 the City of Ontario -- and it hasn't made this decision yet --  
13 produces recycled water, under the Court's order if the  
14 tentative becomes final, that water would not be assessed. But  
15 I'm standing here today to tell you that the overarching  
16 concern is to make sure we get it right. Not who's going to  
17 financially benefit, who's not going to financially benefit.  
18 It's to make sure it gets it right.

19 There will likely --

20 THE COURT: How about just trying to make it work?

21 MS. EWENS: Part of making it work is making sure  
22 that these cities who represent taxpayers and rate payers  
23 understand what they're going to be charged for and what  
24 they're not. And in this instance, the result of not assessing  
25 the produced DYY water, is a significant cost shifting onto  
26 Ontario and its citizens. And we --

Transcript of Proceedings

1 THE COURT: But you said you would -- that the ruling  
2 potentially inures to your client's financial benefit.

3 MS. EWENS: It may. But they would rather --

4 THE COURT: In that situation, there wouldn't be a  
5 cost shifting. It'd actually be a cost shifting to the other  
6 parties.

7 MS. EWENS: That's not a cost shifting. That's  
8 playing by the rules, to be candid, your Honor. They need, in  
9 their planning, to understand what's going to be assessed and  
10 what's not. Currently the Court's tentative --

11 THE COURT: Let me ask you this, so back to my  
12 original point, though, the consequences of this ruling.

13 So what would be in it for the watermaster, Cucamonga  
14 Valley Water District, Inland Empire's, to essentially take  
15 this position if it's just going to cause chaos --

16 MS. EWENS: Again --

17 THE COURT: -- and destable, you know, the whole kind  
18 of system that's been built up over the last 50 years?

19 MS. EWENS: To be clear, part of the destabilization  
20 is whether or not parties can continue to have full faith in  
21 the durability of the judgment and the Court's orders. Or are  
22 they going to be unwound by discretionary determinations by the  
23 watermaster or a letter agreement that did not go through  
24 pooling committees or an advisory committee or before this  
25 court.

26 So I think foundationally, the durability of the

Transcript of Proceedings

1 Court's orders under its continuing jurisdiction, that's  
2 important. That's foundational.

3           The separate issue is financial. And who benefits and  
4 who doesn't? In this particular case, Cucamonga and Fontana,  
5 for example, were able to reap significant financial benefits  
6 by claiming a lot of DYY water and avoiding their assessments  
7 to this assessment year.

8           THE COURT: So they overclaim --

9           MS. EWENS: They overclaim.

10           THE COURT: -- as you put it. But potentially, I  
11 guess, you can overclaim, too. So you can financially benefit  
12 as well.

13           MS. EWENS: But that's not before the Court. That's  
14 something that may or may not happen in the future.

15           THE COURT: I only bring it up because you made the  
16 argument.

17           MS. EWENS: Correct. We made the argument because we  
18 want everybody to be clear that if the rules are changing, and  
19 by the Court's tentative the rules will be changing, then for  
20 everyone when they're doing the annual calculus of what water  
21 they use and what water that they don't, your Court's  
22 tentative, and specifically the portion of the order that  
23 exempts supplemental water and stored water from assessments,  
24 will be part of everyone's calculation.

25           When they sit down with their books and they try to  
26 figure out how much water they have in the system and how much

Transcript of Proceedings

1 they need and how much they can budget to pay for it and what  
2 will be assessed and what will not. So that's not unique to  
3 Ontario. It will change everyone's calculus that has the  
4 option of taking stored or supplemental water.

5 THE COURT: Okay. Thank you, Counsel.

6 MS. EWENS: Thank you.

7 THE COURT: You covered everything quite well. I  
8 appreciate the brevity.

9 MS. EWENS: Thank you, your Honor.

10 THE COURT: Any response?

11 MR. BUNN: Yes, your Honor.

12 The first thing that -- well, we support the Court's  
13 tentative. We request that the Court add to that tentative a  
14 finding that the motion was a renewed motion --

15 (Technical difficulties.)

16 THE COURT: If we could just for -- we're getting some  
17 feedback from somebody. If everybody on Zoom could please mute  
18 your microphones, and then when you want to say something just  
19 open it up again, because we're getting feedback from somebody.  
20 Usually that's because somebody has multiple devices open for  
21 the microphone.

22 I'm sorry. Go ahead.

23 MR. BUNN: Sure.

24 We'd request a finding that this is a renewed motion  
25 under Code of Civil Procedure Section 1008, but it did not --

26 THE COURT: Well, a motion for reconsideration under

Transcript of Proceedings

1 1008 subsection, I think it's D or F, requires me to make a  
2 finding that, one, there were no new facts or no new law. And  
3 if so, Counsel should be sanctioned for contempt, which is  
4 reportable to the State Bar.

5 MR. BUNN: Your Honor --

6 THE COURT: That's a serious --

7 MR. BUNN: -- let me go in reverse order.

8 THE COURT: Okay.

9 MR. BUNN: The section does not require any sanctions  
10 or reporting of contempt. It allows the Court to do so if it  
11 wishes. So --

12 THE COURT: That's true. It's not mandatory. But the  
13 whole point of having that subsection in there is to prevent  
14 parties from coming back and asking for the court to do a redo  
15 when there's been no change to either the law or the facts.

16 And so there should be some consequence for, you know,  
17 making the Court, you know, do that redo. I mean, we're busy.  
18 I'm busy.

19 MR. BUNN: Well, I'll leave that up to the Court. I  
20 think that the purpose of the particular sanction is to deter  
21 future conduct and the Court --

22 THE COURT: It's a significant deterrent, being held  
23 in contempt and having to report that to the State Bar for  
24 further discipline.

25 MR. BUNN: Again, I'm not asking for contempt. What  
26 I'm asking for is a finding that it was a renewed motion. And

Transcript of Proceedings

1 the test for that is whether it seeks the same relief as the  
2 earlier motion.

3 And both the earlier motion and this current one asks  
4 for four categories of relief, and those four are virtually  
5 identical between the two motions.

6 Then the question is whether Ontario complied with  
7 Section 1008, which does not require you to make a finding. It  
8 required them to identify what they contend to be the changed  
9 or new facts, circumstances or law that support their motion.

10 And in this case, they didn't do that.

11 MS. EWENS: Your Honor, may I be heard on this issue?

12 THE COURT: Yes. I just want to mention one other  
13 thing. 1008 also requires a 21-day safe harbor provision, so  
14 that the offending -- potentially offending party can kind of  
15 rethink their position.

16 And to be honest with you, I think that's been  
17 complied with because this was originally set by your request  
18 for the court reporter. So I think the Court, if I do what  
19 counsel is asking -- since you're not asking for it, you're  
20 just reminding me, I guess. So if I do what the court is  
21 reminding me of, this is very serious, if I consider it a  
22 motion for reconsideration.

23 MS. EWENS: I -- I can think of nothing that I hold --  
24 maybe family -- in higher esteem than my obligation as an  
25 attorney and representative of the court. Co-equal to that is  
26 my obligation to my client.



Transcript of Proceedings

1           And in this particular instance, the challenge is a  
2 new challenge based on a new assessment package. And it is  
3 critical, I think, to the Court's consideration that as to the  
4 first challenge of the prior assessment package it's on appeal.  
5 And so if we play this out, and we did, and Ontario did not  
6 comply with the very short 90-day period of time to challenge  
7 the new assessment package that is before the Court today, and  
8 if the first one goes on the appeal and the Court of Appeal  
9 says, we looked at all that, we're going to reverse and remand,  
10 if we were to file a challenge at that point, on the '22-'23,  
11 assessment package, our client would have been time barred.

12           I would have committed malpractice, to be candid,  
13 because I would have knowingly blown past a statute of  
14 limitations deadline and failed to preserve my client's rights.

15           Undoubtedly, this Court is -- its docket is long. The  
16 paper in this case, it goes back to a lawsuit that was  
17 initiated in 1975. It's voluminous. It has not been lost on  
18 me, I assure you, at any stage in this proceeding, either from  
19 the first challenge or the second challenge, the scope of what  
20 was before the Court and the paper that is behind it.  
21 Similarly to other counsel.

22           But the fact of the matter is, with a pending appeal,  
23 and none of us has a crystal ball to know what the Court of  
24 Appeal is going to do, had Ontario not filed the second  
25 challenge, it would have been forever time barred. And  
26 regardless of the outcome of the Court of Appeal, they would

Transcript of Proceedings

1 have not been able, under the short statute of limitations  
2 within the watermaster rules and judgment, they would not have  
3 been able to recoup that -- the injury.

4           The Court of Appeal could have said, you are 100  
5 percent right. And I would come back to your Honor and say,  
6 can we go back because we now want to challenge the '22-'23  
7 assessment package based on this new Court of Appeal opinion.  
8 And I guarantee you, because I would do it, that the first  
9 argument out of respondent's counsel's mouth would be, you're  
10 time barred, because if you wanted to preserve your rights, you  
11 had to do so within 90 days under Section 31 of the judgment.

12           THE COURT: Okay. Well --

13           MR. BUNN: Your Honor, may I respond just to that  
14 last --

15           THE COURT: Counsel interrupted you.

16           MR. BUNN: Yes.

17           THE COURT: So go ahead.

18           MR. BUNN: But I would like to respond to that last  
19 point, if I may.

20           THE COURT: Respond to whatever you would like.

21           MR. BUNN: Thank you.

22           In this case, all five respondents offered Ontario a  
23 stipulation that would preserve her rights on the subsequent  
24 fiscal year until after the appeal was decided, and then that  
25 appellate ruling could be applied to the next fiscal year, and  
26 that was rejected by Ms. Ewens. So --

Transcript of Proceedings

1 MS. EWENS: If I could respond.

2 THE COURT: You can but we're going to wait for him to  
3 finish.

4 MS. EWENS: I thought he was finished.

5 THE COURT: Finish whatever he wants to respond to  
6 your initial arguments, and then we'll come back to you. Okay.

7 MS. EWENS: Okay.

8 MR. BUNN: So back to sanctions for a moment. Court  
9 is correct that 128.7 requires the Court to issue an OSC. And  
10 during that period of time before the OSC, Ontario must have at  
11 least 21 days to withdraw its motion.

12 Frankly, your Honor, I'm not asking for that. In  
13 fact, I'm asking the Court not to do that, because assuming the  
14 Court goes with its tentative, I'd rather have the burden, the  
15 hand of the denial of a motion now than to have things up in  
16 the air further. So that's where we're coming from of that --  
17 on that.

18 Just a couple of points in response to Ms. Ewens  
19 today, and I'm not going to go through everything because that  
20 was dealt with in the tentative.

21 But one of the things that the Court brought up was  
22 about making this judgment work. And I believe the main way  
23 over the last 45 years that we've been able to make the  
24 judgment work is transparency and involvement of all the  
25 parties on -- sometimes on multiple levels and sometimes that  
26 has made for a lot more work for people to go through the

Transcript of Proceedings

1 somewhat cumbersome procedure.

2 But it has worked and it worked in this case. Ontario  
3 not only knew about the 2019 agreement and what that was  
4 proposed to do, but specifically asked how this was going to be  
5 assessed. And they were responded to about how it is going to  
6 be assessed.

7 And of course, the Court's original -- the decision on  
8 the original motion was that Ontario should have reacted at  
9 that point and did not and unaccountably left it for years.

10 I'd also like to talk about the reliance. Contrary to  
11 Ontario's argument, the water stored under a storage and  
12 recovery program has been consistently treated by the  
13 watermaster, such that withdrawal from storage is not assessed.  
14 And my clients relied on that precedent.

15 And the result of -- if Ontario's motion were to be  
16 granted, my clients will be paying double, because they paid  
17 for the imported water when they acquired it and then they paid  
18 for it again pumping it out of the ground. So when we're  
19 talking about making the system work, that doesn't do it.

20 And I think that concludes my rebuttal.

21 THE COURT: Okay. Thank you.

22 Any response?

23 MS. EWENS: Just briefly.

24 We filed --

25 MR. SLATER: Your Honor?

26 THE COURT: Yes, Mr. Slater?

Transcript of Proceedings

1 MR. SLATER: I'm sorry, your Honor. It's very  
2 difficult, when you're away from the mic, we can't hear you.  
3 So I don't mean to interject I just want to make two points if  
4 I might. We submitted --

5 THE COURT: Yes.

6 MR. SLATER: We submitted on the tentative. We think  
7 the tentative is absolutely accurate. We think the tentative  
8 pertains to an assessment under a storage and recover  
9 agreement, capital "S" capital "R." And that comments made by  
10 Ontario's counsel regarding precedent and other actions, other  
11 assessments, is not before you. We're perfectly willing and  
12 happy to explain why this decision is not precedent for other  
13 actions, other agreements, which are authorized under the  
14 judgment as point one.

15 And point two is we -- we do not want to weigh into  
16 the discussion about propriety of this as a motion for  
17 reconsideration, but I do want to clear up the record.

18 When the action was filed, I did directly reach out to  
19 counsel. Understood that the consequence of having a renewed  
20 assessment on an annual basis, and presented the opportunity  
21 for a stipulation, which would have avoided you having to  
22 review this material, and would have applied any ruling of the  
23 Court of Appeal to future assessment packages and agreed to  
24 make conforming changes in the event that that occurred.

25 As Mr. Bunn represented, and I wanted to just share  
26 that proposal was joined in by Cucamonga, Fontana, and it was

Transcript of Proceedings

1 rejected, to our disappointment. We understood they wanted to  
2 go forward, they did, but I wanted to correct that or to make  
3 that point clear.

4 THE COURT: All right. Thank you.

5 MS. EWENS: So if I may respond?

6 We filed something in writing now probably two or  
7 three weeks ago to specifically address the 1008 issue. No one  
8 filed a written response. There was back and forth  
9 communication at the time. And without divulging  
10 attorney/client communications, which I can't do, there was a  
11 decision made based on the particular facts at issue in the  
12 2022-'23 assessment package that weighed into the decision.  
13 And I can't -- I'm an officer of the court, and I have to  
14 protect those confidences.

15 But again, to preserve their rights and to preserve  
16 them fully, with the '22-'23 assessment package, they had to  
17 make the best decision that they could based on the fact that  
18 there is an appeal pending. And Mr. Slater, Mr. Bunn, maybe  
19 they would have advised something differently or maybe they  
20 would have advised the same thing, I don't know.

21 But part of this is doing my job. And making sure  
22 that we're not blowing past statute of limitations and that I'm  
23 considering the full package of what is new in this '22-'23  
24 assessment package, because there are aspects of it that are  
25 new. There are some that are overlap and there are some  
26 aspects that are new.

Transcript of Proceedings

1           And the decision was made to preserve their rights.  
2 And to sanction a member of the Bar who is trying to make sure  
3 that her client's claims are not time barred, I don't  
4 understand how that is sanctionable. And I don't understand  
5 how that advances the ends of justice.

6           THE COURT: The other aspect that I haven't mentioned  
7 yet on the 1008 is that 1008 is a jurisdictional statute. So  
8 unless -- in addition to the sanctions.

9           But -- so unless you meet those two, one of those two  
10 criteria, either you're telling me there's new law that I have  
11 to now take into account, law that has happened after the fact  
12 of the initial ruling, or two, there are new facts, not new  
13 facts that -- after the ruling. Not new facts that you  
14 discovered were actually in existence, but actually new facts  
15 as if, for instance, a party has now died and they were alive  
16 prior to. It's not something that you now just found out  
17 about, because whatever happened was already in existence. The  
18 timeline of everything that happened was already in existence.

19           So I would -- it would be difficult in this situation  
20 to come up with new facts because there are no new facts, as I  
21 understand it. There is no new law. So if you cannot meet one  
22 of those thresholds, then I don't have the jurisdiction to even  
23 rule on the motion. It has to be denied.

24           That's the significance, in addition to the contempt  
25 underpinnings of the 1008 motion. So it's not just Mr. Bunn,  
26 Hey, Judge, I'm reminding you this is a 1008 motion, but I

Transcript of Proceedings

1 don't want you to do anything about it. There are consequences  
2 for me to make that determination in my ruling here.

3 MS. EWENS: Right. And again, it's a new cause of  
4 action, and we cited the tax case in our brief. That's  
5 probably the poster trial situation where it's a new actionable  
6 event.

7 If I would have come back to your Honor with a motion  
8 for consideration and put before you an entirely different  
9 assessment package for an entirely different year, that has an  
10 entirely different cause of action associated with it, albeit  
11 also related to the judgment and assessments, it wouldn't have  
12 been an appropriate motion for reconsideration because it's a  
13 new cause of action based on a new violation, based on a new  
14 assessment determination, based on a new production year, based  
15 on new conduct by the parties who will have, you know, not  
16 complied with Exhibit G performance criteria and whatnot.

17 It was a new cause of action. It was not a motion for  
18 reconsideration. And it was done fundamentally not just to  
19 address the fact that it was a new assessment package, new  
20 claims, it was also done in view of the fact that there was a  
21 pending appeal and a lot of uncertainty about what was going to  
22 happen. Again --

23 THE COURT: Okay. You're rearguing the points that  
24 you've made a number of times.

25 MS. EWENS: And if --

26 THE COURT: Can you just move on to something else --



Transcript of Proceedings

1 MS. EWENS: Yes.

2 THE COURT: -- that you want to respond to, as far as  
3 what Mr. Bunn said or Mr. Slater said.

4 MS. EWENS: Happy to.

5 In terms of Mr. Bunn mentioned discretion and the need  
6 for discretion. Undoubtedly, the folks who are managing this  
7 basin, up to and including pool committees, advisory  
8 committees, watermaster board and watermaster council, have to  
9 exercise some amount of discretion and policy determinations  
10 and whatnot.

11 But again, the judgment provides for safeguards. That  
12 discretion and the ability to pivot is not without boundaries.  
13 And specifically, I'm referring to judgment Section 38-B. The  
14 advisory committee shall have the duty to study and has the  
15 power to recommend for review and act upon all discretionary  
16 determinations made or to be made hereunder by watermaster.

17 So if there is a need to adjust to new projects, new  
18 facts, et cetera, there is a process to do it. And that  
19 involves enlisting the assistance, among others, of the  
20 advisory committee.

21 The other point, and this is very brief in terms of  
22 reliance, specific to Fontana, there should have been no  
23 reliance on any of this, because Fontana doesn't hold a local  
24 agency agreement. So at no time, under the Court's orders,  
25 should Fontana ever have relied on an assumed benefit that it  
26 would be able to produce water from the DYY program, and it

Transcript of Proceedings

1 would be able to use that production to sidestep assessments.

2 And that's all I have, your Honor. Thank you.

3 MR. BUNN: Your Honor, if I may just clarify one  
4 point.

5 THE COURT: Well, you don't get surrebuttal  
6 argument.

7 MR. BUNN: Not to her. To what I heard from you, if I  
8 might.

9 THE COURT: Okay.

10 MR. BUNN: And that is as far as my saying it's a  
11 motion for reconsideration, but I'm not asking the judge to do  
12 anything about it. I am, in fact, asking the Court to base its  
13 denial on that fact that she did not comply.

14 THE COURT: You're asking me then to make a finding  
15 that I don't have jurisdiction --

16 MR. BUNN: Yes, sir.

17 THE COURT: -- to rule other than deny it.

18 MR. BUNN: Yes.

19 THE COURT: Okay. All right. Thank you for that  
20 clarification, Mr. Bunn.

21 Anyone else?

22 Okay. Before I forget -- Rosi, can I get a certified  
23 copy?

24 THE COURT REPORTER: Yes.

25 THE COURT: Thank you.

26 It's very hot. I want to kind of get a site visit

Transcript of Proceedings

1 done as soon as possible. And hopefully my clerk has come up  
2 with a date. But I'm proposing that whoever is going to be  
3 there dress casual, not in suits. I don't want to really be  
4 out in the heat in a suit with a tie. And I just want to make  
5 sure that that's agreeable for everybody and nobody has any  
6 objection to the Court or court staff or clerk being casual,  
7 business casual. Or anyone else there.

8 Is there any objection to the dress code?

9 Okay. Hearing no objection.

10 MR. SLATER: Your Honor, unfortunately, when you're  
11 back we can't hear you.

12 THE COURT: Sorry. I just wanted to talk about the  
13 dress code for the site visit. My proposal is that it be  
14 casual, business casual as a result of the heat. I want to --

15 MR. SLATER: Thank you, your Honor.

16 THE COURT: I just want to kind of do the visit within  
17 the next 30 days on a Friday, and obviously, it's still going  
18 to be very hot. But I really am anxious to kind of visit the  
19 facilities, and hopefully that will give me a better general  
20 understanding of the case.

21 THE JUDICIAL ASSISTANT: Finding a date.

22 MR. SLATER: Yes, your Honor. We will accommodate a  
23 Friday within the next 30 days.

24 THE COURT: So I have a couple dates.

25 All right. So the Court has September 8th and  
26 September 29th that's available. So if you could maybe clear

Transcript of Proceedings

1 that date with -- or actually, let me just ask, since we have  
2 everybody online, whoever is going to be there, are either --  
3 is there any objection to either of those dates?

4 MR. SLATER: Peter Cabbiness is online and I'm waiting  
5 for his response. They look fine, but hopefully Peter can  
6 respond.

7 THE COURT: Well, hearing no objection, let's just set  
8 it for September 8th, at 8:30, I believe you gave the locations  
9 as the watermaster's office location is the meeting point,  
10 Mr. Slater?

11 MR. SLATER: Sorry, your Honor. Sorry, your Honor.  
12 If I can interrupt. Mr. Cabbiness says the 29th is much  
13 preferable.

14 THE COURT: All right. We'll do the 29th of  
15 September, 8:30 at the location --

16 MR. SLATER: Thank you.

17 THE COURT: -- in the moving papers.

18 MR. SLATER: Perfect, your Honor. We'll give notice.

19 THE COURT: So, yes, if you can give notice then. All  
20 right. Okay. Thank you. The Court will take the matter under  
21 submission. I'm currently in trial, so give me a few days to  
22 get out the final ruling. Okay.

23 MS. EWENS: I appreciate it. Thank you, your Honor.

24 THE COURT: Thank you, folks. Have a great weekend.

25 MR. BUNN: Thank you, your Honor.

26 (Proceedings concluded at 11:00 a.m.)

Transcript of Proceedings

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

CHINO BASIN MUNICIPAL WATER DISTRICT,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CASE NO. RCVRS51010
	)	
CITY OF CHINO, et al.,	)	REPORTER'S
	)	CERTIFICATE
Defendants.	)	

STATE OF CALIFORNIA	)	
	)	ss.
COUNTY OF SAN BERNARDINO	)	

I, ROCIO GONZALEZ, Official Reporter Pro Tem of the Superior Court of California, County of San Bernardino, do hereby certify that the foregoing pages, 1 through 35, to the best of my knowledge and belief, comprise a full, true and correct computer-aided transcript of the proceedings taken in the matter of the above-mentioned cause held on Friday, August 4, 2023.

Dated this 7th day of August, 2023.

\_\_\_\_\_  
ROCIO GONZALEZ, CSR No. 10911  
Official Reporter Pro Tem

-	<b>2722</b> 11:23		<b>additional</b> 9:4,5,11
-ooo- 4:7	<b>2722.5</b> 11:19,25	<b>8</b>	<b>additive</b> 14:7
<b>1</b>	<b>29th</b> 34:26 35:12,14	<b>8</b> 10:11 14:6	<b>address</b> 10:7 12:18 14:21 29:7 31:19
<b>100</b> 25:4	<b>3</b>	<b>8:30</b> 35:8,15	<b>adjust</b> 32:17
<b>1008</b> 21:25 22:1 23:7, 13 29:7 30:7,25,26	<b>3</b> 14:22	<b>8th</b> 34:25 35:8	<b>administration</b> 14:6
<b>10911</b> 4:6	<b>30</b> 34:17,23	<b>9</b>	<b>adopted</b> 16:3
<b>10:04</b> 3:2	<b>31</b> 25:11	<b>90</b> 25:11	<b>advance</b> 7:17
<b>11.1</b> 11:22	<b>38-B</b> 32:13	<b>90-day</b> 24:6	<b>advances</b> 30:5
<b>11:00</b> 35:26	<b>4</b>	<b>A</b>	<b>advised</b> 29:19,20
<b>12.1</b> 11:25	<b>4</b> 3:1 14:3,25	<b>a.m.</b> 3:2 35:26	<b>advisory</b> 16:11 19:24 32:7,14,20
<b>128.7</b> 26:9	<b>4-D</b> 10:21	<b>ability</b> 32:12	<b>agencies</b> 18:4
<b>13</b> 6:11	<b>4-Q</b> 13:19	<b>absolutely</b> 11:3 18:3 28:7	<b>agency</b> 3:18 5:2,22 14:23,24,26 15:5,7, 14 32:24
<b>14.1</b> 11:19	<b>4-S</b> 13:17	<b>acceptable</b> 7:25	<b>agreeable</b> 34:5
<b>15</b> 17:8	<b>4.1</b> 14:3	<b>accommodate</b> 6:21 34:22	<b>agreed</b> 28:23
<b>16</b> 17:8	<b>40</b> 17:8	<b>accomplish</b> 6:13,18	<b>agreement</b> 12:26 14:23,24 15:1,5,8,14 16:14 19:23 27:3 28:9 32:24
<b>17</b> 17:8	<b>45</b> 26:23	<b>account</b> 11:21,26 13:1,4,5,7 30:11	<b>agreements</b> 14:26 28:13
<b>1975</b> 24:17	<b>5</b>	<b>accounting</b> 13:6	<b>Agricultural</b> 3:16 5:19,25 6:1
<b>1978</b> 13:14 16:16	<b>5</b> 8:23	<b>accurate</b> 15:3 28:7	<b>ahead</b> 6:6 21:22 25:17
<b>2</b>	<b>50</b> 19:18	<b>acquired</b> 27:17	<b>air</b> 26:16
<b>2003</b> 15:2 16:19 17:5	<b>50-year</b> 12:22	<b>acre</b> 11:19,23,25 13:4,18	<b>albeit</b> 31:10
<b>2004</b> 15:7 16:19 17:5	<b>53</b> 11:18 13:15	<b>act</b> 32:15	<b>alive</b> 30:15
<b>2019</b> 27:3	<b>6</b>	<b>action</b> 28:18 31:4,10, 13,17	<b>Allen</b> 3:9 5:8
<b>2022-'23</b> 29:12	<b>6</b> 6:11	<b>actionable</b> 31:5	<b>allowed</b> 15:22
<b>2023</b> 3:1	<b>7</b>	<b>actions</b> 28:10,13	<b>alphabetical</b> 4:15
<b>21</b> 26:11	<b>75</b> 18:8	<b>add</b> 21:13	<b>amend</b> 17:18
<b>21-day</b> 23:13		<b>addition</b> 30:8,24	
<b>22-'23</b> 24:10 25:6 29:16,23			

Transcript of Proceedings

<p><b>amendment</b> 16:12</p> <p><b>amount</b> 10:3 12:13 32:9</p> <p><b>Amy</b> 7:23</p> <p><b>Andrew</b> 3:5 5:6</p> <p><b>annual</b> 9:12 13:17 20:20 28:20</p> <p><b>anticipate</b> 7:3</p> <p><b>anxious</b> 34:18</p> <p><b>apologize</b> 10:22 14:15</p> <p><b>appeal</b> 24:4,8,22,24, 26 25:4,7,24 28:23 29:18 31:21</p> <p><b>appearance</b> 4:11,14, 18</p> <p><b>appearances</b> 3:4 4:10</p> <p><b>appeared</b> 12:21</p> <p><b>appellate</b> 25:25</p> <p><b>appended</b> 14:5</p> <p><b>applicable</b> 14:9</p> <p><b>applied</b> 25:25 28:22</p> <p><b>appropriative</b> 3:25 5:15 14:7</p> <p><b>area</b> 7:1</p> <p><b>areas</b> 6:11</p> <p><b>argument</b> 17:24 20:16,17 25:9 27:11 33:6</p> <p><b>arguments</b> 26:6</p> <p><b>art</b> 14:10</p> <p><b>Article</b> 14:3</p> <p><b>asks</b> 23:3</p> <p><b>aspect</b> 18:3 30:6</p>	<p><b>aspects</b> 29:24,26</p> <p><b>assess</b> 12:4,8</p> <p><b>assessable</b> 12:16</p> <p><b>assessed</b> 10:10 11:15 12:1 13:14 14:12 17:19 18:2,10, 14 19:9 21:2 27:5,6, 13</p> <p><b>assessing</b> 18:24</p> <p><b>assessment</b> 10:14 11:18,22 14:9 20:7 24:2,4,7,11 25:7 28:8,20,23 29:12,16, 24 31:9,14,19</p> <p><b>assessments</b> 11:14 12:8 13:16 14:3 15:23 20:6,23 28:11 31:11 33:1</p> <p><b>assigned</b> 16:20</p> <p><b>assistance</b> 32:19</p> <p><b>ASSISTANT</b> 34:21</p> <p><b>assumed</b> 32:25</p> <p><b>assuming</b> 26:13</p> <p><b>assurances</b> 18:1</p> <p><b>assure</b> 24:18</p> <p><b>attached</b> 8:19</p> <p><b>attendees</b> 7:22</p> <p><b>attending</b> 7:13</p> <p><b>attention</b> 11:18</p> <p><b>attorney</b> 3:5,9,11,14, 15,19,22,24,26 5:23 6:2 23:25</p> <p><b>attorney/client</b> 29:10</p> <p><b>attorneys</b> 3:7,17 4:2 16:17</p> <p><b>audible</b> 6:4</p>	<p><b>AUGUST</b> 3:1</p> <p><b>authority</b> 15:9 16:24 17:3,4,5,10,15</p> <p><b>authorized</b> 28:13</p> <p><b>avoided</b> 28:21</p> <p><b>avoiding</b> 20:6</p> <hr/> <p style="text-align: center;"><b>B</b></p> <hr/> <p><b>back</b> 10:16 13:11,21 16:12 19:11 22:14 24:16 25:5,6 26:6,8 29:8 31:7 34:11</p> <p><b>balance</b> 17:11</p> <p><b>balances</b> 17:2</p> <p><b>ball</b> 24:23</p> <p><b>Bar</b> 22:4,23 30:2</p> <p><b>barred</b> 24:11,25 25:10 30:3</p> <p><b>base</b> 33:12</p> <p><b>based</b> 10:9 13:16 14:4 17:9 24:2 25:7 29:11,17 31:13,14</p> <p><b>basin</b> 3:8 4:9 5:4,17 10:22,23 11:1 12:23 13:13,20,23,24,25 14:1 15:16 16:6,7,25 18:3 32:7</p> <p><b>basins</b> 6:26 7:3</p> <p><b>basis</b> 28:20</p> <p><b>begin</b> 4:17 6:6</p> <p><b>beginning</b> 13:21</p> <p><b>behalf</b> 5:2,6,9,11,13, 15,17,19,21,24</p> <p><b>belabor</b> 10:4</p> <p><b>beneath</b> 11:9</p>	<p><b>benefit</b> 18:7,17 19:2 20:11 32:25</p> <p><b>benefits</b> 20:3,5</p> <p><b>BERNARDINO</b> 3:1</p> <p><b>bit</b> 8:1</p> <p><b>blowing</b> 29:22</p> <p><b>blown</b> 24:13</p> <p><b>board</b> 32:8</p> <p><b>books</b> 20:25</p> <p><b>boundaries</b> 32:12</p> <p><b>Boyd</b> 4:1 5:23,24</p> <p><b>Brad</b> 5:16</p> <p><b>BRADLEY</b> 3:7</p> <p><b>brevity</b> 21:8</p> <p><b>briefed</b> 10:3</p> <p><b>briefing</b> 16:13</p> <p><b>briefly</b> 27:23</p> <p><b>bring</b> 20:15</p> <p><b>broad</b> 11:12 12:2 13:25</p> <p><b>broadest</b> 11:8</p> <p><b>brought</b> 26:21</p> <p><b>budget</b> 21:1</p> <p><b>budgeting</b> 18:5</p> <p><b>built</b> 19:18</p> <p><b>Bunn</b> 3:19 4:22 21:11,23 22:5,7,9, 19,25 25:13,16,18, 21 26:8 28:25 29:18 30:25 32:3,5 33:3,7, 10,16,18,20 35:25</p> <p><b>burden</b> 16:1 26:14</p> <p><b>business</b> 8:13 34:7, 14</p> <p><b>busy</b> 22:17,18</p>
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

Transcript of Proceedings

<b>C</b>			
	<b>check</b> 17:11	<b>committees</b> 16:11 19:24 32:7,8	<b>contempt</b> 22:3,10,23, 25 30:24
	<b>checks</b> 17:2,9	<b>communication</b> 29:9	<b>contend</b> 23:8
<b>Cabbiness</b> 7:22 35:4, 12	<b>Chino</b> 3:8 4:1,9,26 5:4,17 13:13,20 14:1	<b>communications</b> 29:10	<b>continue</b> 6:21 7:18 19:20
<b>Calciano</b> 3:25 4:25, 26	<b>Cihigoyenette</b> 3:16, 17 5:1,2,20,21	<b>communities</b> 15:25	<b>continuing</b> 14:2 20:1
<b>calculation</b> 20:24	<b>circumstances</b> 23:9	<b>Community</b> 3:23 5:13	<b>contrary</b> 17:24 27:10
<b>calculations</b> 18:6	<b>cite</b> 14:16	<b>Company</b> 3:20 4:23 5:7	<b>controlled</b> 9:9
<b>calculus</b> 20:20 21:3	<b>cited</b> 31:4	<b>complied</b> 23:6,17 31:16	<b>coordinate</b> 8:6,7
<b>calendar</b> 8:5	<b>cities</b> 18:22	<b>comply</b> 24:6 33:13	<b>copy</b> 33:23
<b>California</b> 3:1 4:3 5:24 6:1	<b>citizens</b> 18:26	<b>concern</b> 8:25 18:16	<b>correct</b> 17:26 18:10 20:17 26:9 29:2
<b>candid</b> 19:8 24:12	<b>City</b> 3:14 4:1,17,20,26 10:8 12:12 15:17,19, 26 17:18 18:4,12	<b>concerns</b> 17:13	<b>cost</b> 14:6 18:25 19:5, 7
<b>capability</b> 7:10	<b>Civil</b> 21:25	<b>concluded</b> 35:26	<b>council</b> 32:8
<b>capital</b> 28:9	<b>claiming</b> 20:6	<b>concludes</b> 27:20	<b>counsel</b> 10:1 21:5 22:3 23:19 24:21 25:15 28:10,19
<b>Carol</b> 4:1 5:24	<b>claims</b> 30:3 31:20	<b>conditions</b> 16:25	<b>counsel's</b> 25:9
<b>case</b> 4:9 12:22 14:12 16:20 17:10,17 20:4 23:10 24:16 25:22 27:2 31:4 34:20	<b>clarification</b> 33:20	<b>conduct</b> 17:11 22:21 31:15	<b>couple</b> 6:10 8:12 26:18 34:24
<b>casual</b> 34:3,6,7,14	<b>clarify</b> 33:3	<b>Conference</b> 3:6,8,10, 13,19,23,26 4:4	<b>court</b> 4:9,21 6:3,5,9, 25 7:14,16 8:3,12,18 9:3,6,16,17,22,26 10:5,12,26 11:5 12:17 13:23 14:13, 16,17,18,21,22,25 16:4,12 17:18,22 18:7,20 19:1,4,11, 17,25 20:8,10,13,15 21:5,7,10,13,16,26 22:6,8,10,12,14,17, 19,21,22 23:12,18, 20,25 24:7,8,15,20, 23,26 25:4,7,12,15, 17,20 26:2,5,8,9,13, 14,21 27:21,26 28:5, 23 29:4,13 30:6 31:23,26 32:2 33:5, 9,12,14,17,19,24,25
<b>categories</b> 10:15 23:4	<b>clear</b> 12:12,20 17:7 19:19 20:18 28:17 29:3 34:26	<b>confidences</b> 29:14	
<b>category</b> 10:13	<b>clerk</b> 8:4,5 34:1,6	<b>conforming</b> 28:24	
<b>certified</b> 33:22	<b>client</b> 23:26 24:11	<b>consequence</b> 22:16 28:19	
<b>cetera</b> 32:18	<b>client's</b> 19:2 24:14 30:3	<b>consequences</b> 19:12 31:1	
<b>challenge</b> 24:1,2,4,6, 10,19,25 25:6	<b>clients</b> 27:14,16	<b>considerable</b> 9:14 15:11,20	
<b>change</b> 8:21,22,25 16:8 21:3 22:15	<b>close</b> 8:13	<b>consideration</b> 24:3 31:8	
<b>changed</b> 9:26 23:8	<b>Co-equal</b> 23:25	<b>consistent</b> 11:13 12:2,10,11,15	
<b>changing</b> 20:18,19	<b>code</b> 21:25 34:8,13	<b>consistently</b> 27:12	
<b>chaos</b> 15:13 17:24 19:15	<b>comfort</b> 9:10	<b>contemplated</b> 14:26	
<b>charged</b> 18:23	<b>comments</b> 28:9		
	<b>committed</b> 24:12		
	<b>committee</b> 3:25 5:9 19:24 32:14,20		



Transcript of Proceedings

<p>34:6,12,16,24,25 35:7,14,17,19,20,24</p> <p><b>Court's</b> 9:23 10:8,11, 12 11:13,17 12:5,15, 19 13:9 14:21,25 15:4,7 16:19 17:4,9, 16 18:8,13 19:10,21 20:1,19,21 21:12 24:3 27:7 32:24</p> <p><b>Courtcall</b> 5:4</p> <p><b>covered</b> 21:7</p> <p><b>crisp</b> 6:17</p> <p><b>criteria</b> 30:10 31:16</p> <p><b>critical</b> 7:22 13:22 24:3</p> <p><b>crystal</b> 24:23</p> <p><b>CSR</b> 4:6</p> <p><b>Cucamonga</b> 3:21 4:23 19:13 20:4 28:26</p> <p><b>cumbersome</b> 27:1</p> <p><b>Cumulatively</b> 15:20</p> <p><b>current</b> 23:3</p> <hr/> <p style="text-align: center;"><b>D</b></p> <hr/> <p><b>date</b> 7:15 9:17 34:2, 21 35:1</p> <p><b>dates</b> 7:18,24,25 8:5, 6,10,13 9:18 34:24 35:3</p> <p><b>day</b> 6:13</p> <p><b>days</b> 25:11 26:11 34:17,23 35:21</p> <p><b>deadline</b> 24:14</p> <p><b>deal</b> 17:1</p> <p><b>dealing</b> 11:12</p>	<p><b>dealt</b> 26:20</p> <p><b>debit</b> 13:3</p> <p><b>decided</b> 25:24</p> <p><b>decision</b> 18:12 27:7 28:12 29:11,12,17 30:1</p> <p><b>declaration</b> 8:19</p> <p><b>defined</b> 10:17,19 11:3 12:23</p> <p><b>defines</b> 10:22 11:8</p> <p><b>definition</b> 10:13,19, 23 11:6,11 12:2,7,23 14:21 15:4 16:9</p> <p><b>denial</b> 26:15 33:13</p> <p><b>denied</b> 30:23</p> <p><b>deny</b> 33:17</p> <p><b>DEPARTMENT</b> 3:3</p> <p><b>dependent</b> 7:9</p> <p><b>depictions</b> 8:20</p> <p><b>Deputy</b> 4:2 5:23 6:2</p> <p><b>designated</b> 7:26</p> <p><b>desire</b> 14:17</p> <p><b>destabilization</b> 19:19</p> <p><b>destable</b> 19:17</p> <p><b>deter</b> 22:20</p> <p><b>determination</b> 10:9 31:2,14</p> <p><b>determinations</b> 19:22 32:9,16</p> <p><b>deterrent</b> 22:22</p> <p><b>devices</b> 7:11,12 21:20</p> <p><b>died</b> 30:15</p> <p><b>differently</b> 29:19</p> <p><b>difficult</b> 28:2 30:19</p>	<p><b>difficulties</b> 21:15</p> <p><b>direct</b> 11:17</p> <p><b>directly</b> 28:18</p> <p><b>disappointment</b> 29:1</p> <p><b>discipline</b> 22:24</p> <p><b>discovered</b> 30:14</p> <p><b>discretion</b> 17:1 32:5, 6,9,12</p> <p><b>discretionary</b> 15:8 16:24 19:22 32:15</p> <p><b>discussion</b> 6:20 28:16</p> <p><b>District</b> 3:13,21 4:24 5:7,11,13 19:14</p> <p><b>divulging</b> 29:9</p> <p><b>doable</b> 6:15</p> <p><b>docket</b> 24:15</p> <p><b>document</b> 12:21 13:12</p> <p><b>dollars</b> 15:21,22</p> <p><b>double</b> 27:16</p> <p><b>drafting</b> 10:25 11:5</p> <p><b>dress</b> 34:3,8,13</p> <p><b>drive-by</b> 7:2</p> <p><b>driven</b> 6:18</p> <p><b>durability</b> 16:15 19:21,26</p> <p><b>duty</b> 32:14</p> <p><b>DYY</b> 10:15 12:25,26 13:1,2,8 15:1 17:19 18:25 20:6 32:26</p> <hr/> <p style="text-align: center;"><b>E</b></p> <hr/> <p><b>earlier</b> 23:2,3</p>	<p><b>ECO</b> 11:20</p> <p><b>effectively</b> 12:5 16:4 17:16</p> <p><b>Egoscue</b> 3:15 5:18</p> <p><b>Elizabeth</b> 3:13,25 4:19,25</p> <p><b>Empire</b> 3:18 5:2,21</p> <p><b>Empire's</b> 19:14</p> <p><b>encompass</b> 13:24</p> <p><b>end</b> 10:23 16:4</p> <p><b>ends</b> 30:5</p> <p><b>enlisting</b> 32:19</p> <p><b>ensure</b> 17:19</p> <p><b>entered</b> 14:23,24</p> <p><b>entirety</b> 7:6</p> <p><b>envision</b> 7:1</p> <p><b>essentially</b> 18:7 19:14</p> <p><b>esteem</b> 23:24</p> <p><b>event</b> 28:24 31:6</p> <p><b>everyone's</b> 20:24 21:3</p> <p><b>Ewens</b> 3:13 4:19 9:25 10:2 14:14,19 18:1, 11,21 19:3,7,16,19 20:9,13,17 21:6,9 23:11,23 25:26 26:1, 4,7,18 27:23 29:5 31:3,25 32:1,4 35:23</p> <p><b>exclude</b> 11:6 12:3 16:9,10</p> <p><b>excluded</b> 12:7,8</p> <p><b>excludes</b> 10:18 11:4</p> <p><b>executed</b> 15:1</p> <p><b>exempt</b> 15:9</p>
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

Transcript of Proceedings

<b>exempts</b> 20:23	<b>filing</b> 8:24	<b>foundationally</b> 19:26	14:1,12 15:23 16:9 17:19
<b>exercise</b> 32:9	<b>fill</b> 9:17	<b>frankly</b> 15:13 26:12	<b>guarantee</b> 25:8
<b>exhibit</b> 8:20,22,23 9:5 11:18 14:6,14 31:16	<b>final</b> 12:14,15 18:14 35:22	<b>Friday</b> 3:1 34:17,23	<b>guess</b> 9:23 20:11 23:20
<b>existence</b> 30:14,17, 18	<b>financial</b> 15:19 18:1,6 19:2 20:3,5	<b>full</b> 19:20 29:23	<b>guidance</b> 13:12
<b>exit</b> 7:5	<b>financially</b> 18:17 20:11	<b>fully</b> 29:16	<hr/>
<b>exiting</b> 7:10	<b>finding</b> 12:5 21:14,24 22:2,26 23:7 33:14 34:21	<b>fundamental</b> 15:9	<b>H</b>
<b>expense</b> 14:8 15:26	<b>finds</b> 10:12	<b>fundamentally</b> 16:2 31:18	<hr/>
<b>explain</b> 28:12	<b>fine</b> 35:5	<b>funding</b> 12:26 15:1	<b>hand</b> 26:15
<b>explicitly</b> 10:18 16:9	<b>finish</b> 26:3,5	<b>future</b> 16:21 17:20 18:11 20:14 22:21 28:23	<b>handle</b> 15:5
<b>extent</b> 7:17	<b>finished</b> 26:4	<hr/>	<b>happen</b> 20:14 31:22
<b>extra</b> 16:1	<b>fiscal</b> 25:24,25	<b>G</b>	<b>happened</b> 30:11,17, 18
<b>extract</b> 13:19,26	<b>fit</b> 16:25	<b>Gagen</b> 3:5 5:6	<b>happening</b> 7:1,3 17:17
<hr/>	<b>flexibility</b> 8:1	<b>gain</b> 15:25	<b>happy</b> 14:16 28:12 32:4
<b>F</b>	<b>folks</b> 7:18 8:8 15:18, 22 16:6,17 32:6 35:24	<b>gave</b> 35:8	<b>harbor</b> 23:13
<hr/>	<b>follow</b> 7:11	<b>general</b> 5:24 6:2 9:13 14:8 34:19	<b>head</b> 12:6
<b>facilities</b> 34:19	<b>Fontana</b> 3:20 4:23 11:20 14:24 15:3,4,5 20:4 28:26 32:22,23, 25	<b>GILBERT</b> 3:3	<b>hear</b> 28:2 34:11
<b>fact</b> 11:14 24:22 26:13 29:17 30:11 31:19,20 33:12,13	<b>foot</b> 13:4,5	<b>give</b> 4:10 9:19,20 34:19 35:18,19,21	<b>heard</b> 8:15 10:1 23:11 33:7
<b>facts</b> 22:2,15 23:9 29:11 30:12,13,14, 20 32:18	<b>forever</b> 24:25	<b>giving</b> 4:11	<b>hearing</b> 6:5 14:17 34:9 35:7
<b>failed</b> 24:14	<b>forget</b> 33:22	<b>Gonzalez</b> 4:5	<b>heat</b> 34:4,14
<b>faith</b> 19:20	<b>formal</b> 16:12	<b>good</b> 4:22,25 5:1,8, 10,12,14,16,18,20, 23,26 8:5 9:15	<b>hefty</b> 10:3
<b>falls</b> 16:22	<b>forum</b> 17:13	<b>Grady</b> 3:22 5:12	<b>held</b> 22:22
<b>family</b> 23:24	<b>forward</b> 4:10 12:6 29:2	<b>grant</b> 6:9	<b>helpful</b> 9:15
<b>favor</b> 17:18	<b>found</b> 10:26 14:25 30:16	<b>granted</b> 9:16 27:16	<b>hereunder</b> 32:16
<b>feedback</b> 21:17,19	<b>foundational</b> 20:2	<b>great</b> 8:12 17:1 35:24	<b>Herrema</b> 3:7 5:16
<b>feet</b> 11:19,23,25 13:18		<b>ground</b> 11:9 27:18	<b>Hey</b> 30:26
<b>figure</b> 20:26		<b>groundwater</b> 10:9,10, 13 11:2,7,8,12 12:3, 4,8,23 13:20,22,26	<b>higher</b> 23:24
<b>file</b> 8:22 9:1,11 24:10			<b>Hills</b> 4:1,26
<b>filed</b> 24:24 27:24 28:18 29:6,8			<b>historical</b> 12:11 17:24

Transcript of Proceedings

<p><b>historically</b> 11:15 12:3</p> <p><b>history</b> 12:22 14:12</p> <p><b>hold</b> 23:23 32:23</p> <p><b>holds</b> 12:12</p> <p><b>HON</b> 3:3</p> <p><b>honest</b> 23:16</p> <p><b>Honor</b> 4:19,22,25 5:1, 8,10,12,14,16,18,20, 23,26 6:16,20,23 7:4,20,24 8:9,16 9:8, 12,21,25 10:2 16:20 19:8 21:9,11 22:5 23:11 25:5,13 26:12 27:25 28:1 31:7 33:2,3 34:10,15,22 35:11,18,23,25</p> <p><b>hot</b> 33:26 34:18</p> <p><b>housekeeping</b> 8:17</p> <p><b>Hubsch</b> 3:9 5:8</p> <hr/> <p style="text-align: center;"><b>I</b></p> <hr/> <p><b>identical</b> 23:5</p> <p><b>identified</b> 11:23,26</p> <p><b>identifies</b> 11:19</p> <p><b>identify</b> 23:8</p> <p><b>IEUA</b> 15:1</p> <p><b>ignores</b> 11:14</p> <p><b>impact</b> 15:19 18:3</p> <p><b>important</b> 7:21 10:16 13:21 20:2</p> <p><b>imported</b> 27:17</p> <p><b>include</b> 10:14,24 11:1</p> <p><b>includes</b> 8:20 11:4</p> <p><b>including</b> 11:19 32:7</p>	<p><b>inclusive</b> 11:12 13:26</p> <p><b>individual</b> 14:26</p> <p><b>information</b> 9:20</p> <p><b>initial</b> 26:6 30:12</p> <p><b>initially</b> 8:24</p> <p><b>initiated</b> 24:17</p> <p><b>injured</b> 15:18</p> <p><b>injury</b> 25:3</p> <p><b>Inland</b> 3:18 5:2,21 19:14</p> <p><b>input</b> 8:14</p> <p><b>instance</b> 6:25 18:24 24:1 30:15</p> <p><b>instances</b> 7:5,8</p> <p><b>intend</b> 9:1</p> <p><b>intended</b> 13:23 16:8</p> <p><b>intending</b> 7:6</p> <p><b>intent</b> 12:9</p> <p><b>interest</b> 11:17</p> <p><b>interests</b> 16:7</p> <p><b>interject</b> 28:3</p> <p><b>interrupt</b> 35:12</p> <p><b>interrupted</b> 25:15</p> <p><b>inures</b> 19:2</p> <p><b>involvement</b> 26:24</p> <p><b>involves</b> 16:11 32:19</p> <p><b>Irrigation</b> 5:7</p> <p><b>issue</b> 12:18 15:19 16:2,21 20:3 23:11 26:9 29:7,11</p> <hr/> <p style="text-align: center;"><b>J</b></p> <hr/> <p><b>Jean</b> 3:17 5:2</p>	<p><b>job</b> 29:21</p> <p><b>John</b> 3:23 5:14</p> <p><b>joined</b> 28:26</p> <p><b>judge</b> 3:3 30:26 33:11</p> <p><b>judgment</b> 10:17,18, 19,21,25 11:2,5,7 12:10 13:13,15,23 14:6,11,14 16:5,15, 16,19,26 17:6,7,8 19:21 25:2,11 26:22, 24 28:14 31:11 32:11,13</p> <p><b>JUDICIAL</b> 34:21</p> <p><b>jump</b> 14:15</p> <p><b>junction</b> 9:7</p> <p><b>jurisdiction</b> 17:10 20:1 30:22 33:15</p> <p><b>jurisdictional</b> 30:7</p> <p><b>Jurupa</b> 3:22 5:13</p> <p><b>justice</b> 30:5</p> <hr/> <p style="text-align: center;"><b>K</b></p> <hr/> <p><b>Kennedy</b> 3:11 5:10</p> <p><b>kind</b> 8:4 17:25 19:17 23:14 33:26 34:16, 18</p> <p><b>knew</b> 27:3</p> <p><b>knowingly</b> 24:13</p> <p><b>knowledge</b> 9:14</p> <hr/> <p style="text-align: center;"><b>L</b></p> <hr/> <p><b>labeling</b> 8:26</p> <p><b>language</b> 10:17</p> <p><b>large</b> 6:14 7:1</p> <p><b>law</b> 3:5,7,9,11,14,15, 17,20,22,24,26 22:2, 15 23:9 30:10,11,21</p>	<p><b>lawsuit</b> 24:16</p> <p><b>leave</b> 7:8 22:19</p> <p><b>left</b> 7:14 9:17 27:9</p> <p><b>letter</b> 16:13 19:23</p> <p><b>levee</b> 13:16</p> <p><b>level</b> 9:10</p> <p><b>levels</b> 26:25</p> <p><b>Levine</b> 4:2 5:26</p> <p><b>levy</b> 14:3</p> <p><b>limitations</b> 24:14 25:1 29:22</p> <p><b>limits</b> 11:13</p> <p><b>lines</b> 11:2</p> <p><b>literal</b> 15:26</p> <p><b>lives</b> 13:13</p> <p><b>local</b> 14:23,24,26 15:5,7,14 32:23</p> <p><b>location</b> 7:8 35:9,15</p> <p><b>locations</b> 8:20,21 35:8</p> <p><b>long</b> 24:15</p> <p><b>looked</b> 24:9</p> <p><b>lost</b> 24:17</p> <p><b>lot</b> 20:6 26:26 31:21</p> <hr/> <p style="text-align: center;"><b>M</b></p> <hr/> <p><b>made</b> 18:12 20:15,17 26:26 28:9 29:11 30:1 31:24 32:16</p> <p><b>main</b> 26:22</p> <p><b>make</b> 4:17 6:23 15:17 17:11 18:16,18,20 22:1 23:7 26:23</p>
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

Transcript of Proceedings

28:3,24 29:2,17 30:2 31:2 33:14 34:4	<b>moment</b> 26:8	<b>observers</b> 8:2	19:21 20:1 32:24
<b>making</b> 18:21 22:17 26:22 27:19 29:21	<b>Monte</b> 3:6 5:6,7	<b>occurred</b> 28:24	<b>original</b> 10:25 19:12 27:7,8
<b>Malone</b> 7:23	<b>morning</b> 4:22,25 5:1, 8,10,12,14,16,18,20, 23,26	<b>OCHOA</b> 3:3	<b>originally</b> 23:17
<b>malpractice</b> 24:12	<b>motion</b> 6:6 8:14 9:3, 16,22 21:14,24,26 22:26 23:2,3,9,22 26:11,15 27:8,15 28:16 30:23,25,26 31:7,12,17 33:11	<b>offending</b> 23:14	<b>OSC</b> 26:9,10
<b>management</b> 18:3	<b>motions</b> 23:5	<b>offer</b> 7:24 8:22	<b>outcome</b> 24:26
<b>managing</b> 32:6	<b>mouth</b> 25:9	<b>offered</b> 25:22	<b>outlive</b> 16:17
<b>mandatory</b> 22:12	<b>move</b> 31:26	<b>office</b> 35:9	<b>outlived</b> 16:16
<b>mapped</b> 6:17	<b>moving</b> 4:11 6:8 35:17	<b>officer</b> 29:13	<b>overarching</b> 18:15
<b>Marilyn</b> 4:2 5:26	<b>multiple</b> 21:20 26:25	<b>Official</b> 4:5	<b>overclaim</b> 20:8,9,11
<b>Martin</b> 3:16 5:21	<b>Municipal</b> 3:12 5:11	<b>ongoing</b> 17:10	<b>overlap</b> 29:25
<b>match</b> 7:25	<b>mute</b> 21:17	<b>online</b> 35:2,4	
<b>material</b> 28:22		<b>Ontario</b> 3:14 4:17,20 12:9,10,12 15:17,20, 26 18:4,12,26 21:3 23:6 24:5,24 25:22 26:10 27:2,8	<b>P</b>
<b>materially</b> 15:18		<b>Ontario's</b> 9:22 12:14 17:18 18:9 27:11,15 28:10	<b>package</b> 11:18,22 24:2,4,7,11 25:7 29:12,16,23,24 31:9, 19
<b>materials</b> 9:4,6,8	<b>N</b>	<b>open</b> 7:15 21:19,20	<b>packages</b> 28:23
<b>matter</b> 24:22 35:20		<b>operating</b> 13:7 14:22, 23 15:2,4	<b>paid</b> 27:16,17
<b>meaning</b> 12:24 14:11	<b>narrative</b> 7:23	<b>operative</b> 11:11	<b>paper</b> 10:4 24:16,20
<b>means</b> 13:19,26	<b>narratives</b> 9:9	<b>opinion</b> 25:7	<b>papers</b> 35:17
<b>meant</b> 11:5	<b>native</b> 10:9 11:14	<b>opportunity</b> 7:5 9:23 28:20	<b>paragraph</b> 10:21 13:17 14:13
<b>meet</b> 15:4 30:9,21	<b>Non-agricultural</b> 3:10 5:9	<b>opposition</b> 6:9 8:15	<b>Paragraphs</b> 17:8
<b>meeting</b> 35:9	<b>notice</b> 7:14 8:11 9:19 14:17 35:18,19	<b>opt</b> 15:12,24	<b>part</b> 10:15,26 11:26 13:9 18:21 19:19 20:24 29:21
<b>member</b> 5:25 6:1 30:2	<b>number</b> 6:26 31:24	<b>opting</b> 15:18	<b>participant</b> 15:6
<b>mention</b> 23:12		<b>option</b> 21:4	<b>parties</b> 7:15 8:7,11,24 10:25 13:16 14:4,22, 23 15:2,12,17 17:13 19:6,20 22:14 26:25 31:15
<b>mentioned</b> 9:3 30:6 32:5	<b>O</b>	<b>order</b> 4:13,15 7:14 10:12 11:13 12:11, 14,15,17 13:9 15:7 16:19 17:4,18 18:11, 13 20:22 22:7	<b>party</b> 4:11 6:8 13:8 15:5,9 16:8 23:14 30:15
<b>Metropolitan</b> 13:4,6	<b>objection</b> 34:6,8,9 35:3,7	<b>orders</b> 16:20 17:16	
<b>mic</b> 28:2	<b>obligation</b> 15:23 23:24,26		
<b>microphone</b> 21:21			
<b>microphones</b> 21:18			
<b>millions</b> 15:22			
<b>modify</b> 16:24			

Transcript of Proceedings

<b>past</b> 24:13 29:22	<b>policy</b> 32:9	<b>produces</b> 18:13	<b>quantity</b> 13:17
<b>pay</b> 15:23 21:1	<b>pool</b> 3:10,16,25 5:9, 15,19,25 6:1 7:26 8:1 14:7 32:7	<b>product</b> 13:24	<b>question</b> 23:6
<b>payers</b> 18:22	<b>pooling</b> 14:5 16:11 19:24	<b>production</b> 11:14 12:16 13:8,14,16,17 14:4,9,10 17:19 31:14 33:1	<b>questions</b> 6:10
<b>paying</b> 27:16	<b>portion</b> 14:20 20:22	<b>program</b> 9:4 12:25,26 13:8,10 15:6,13,15 27:12 32:26	<b>quote</b> 10:12 14:6,15
<b>pending</b> 24:22 29:18 31:21	<b>position</b> 12:14 16:3 19:15 23:15	<b>programs</b> 15:24	<hr/> <b>R</b> <hr/>
<b>people</b> 4:16 7:12 15:26 26:26	<b>poster</b> 31:5	<b>project</b> 16:26	<b>rate</b> 18:22
<b>percent</b> 18:8 25:5	<b>potentially</b> 15:22 19:2 20:10 23:14	<b>projects</b> 32:17	<b>reach</b> 28:18
<b>Perfect</b> 35:18	<b>power</b> 13:15 32:15	<b>proposal</b> 28:26 34:13	<b>reacted</b> 27:8
<b>perfectly</b> 28:11	<b>practice</b> 12:4,12	<b>proposed</b> 12:5,17 27:4	<b>read</b> 9:13
<b>performance</b> 31:16	<b>precedent</b> 15:11 17:25 27:14 28:10, 12	<b>proposing</b> 34:2	<b>reap</b> 20:5
<b>period</b> 6:24 15:21 24:6 26:10	<b>preceding</b> 14:9	<b>propriety</b> 28:16	<b>rearguing</b> 31:23
<b>person</b> 7:21	<b>preferable</b> 35:13	<b>prospective</b> 7:24	<b>reason</b> 15:13,14 17:17
<b>personal</b> 15:25	<b>presented</b> 28:20	<b>protect</b> 29:14	<b>reasonable</b> 6:13
<b>pertains</b> 28:8	<b>preservation</b> 15:16	<b>provide</b> 8:11 14:15, 16	<b>rebuttal</b> 27:20
<b>Peter</b> 7:22 35:4,5	<b>preserve</b> 24:14 25:10,23 29:15 30:1	<b>provision</b> 13:15 23:13	<b>recharge</b> 6:26
<b>piece</b> 8:16	<b>pretty</b> 6:14 7:1 9:14	<b>provisions</b> 17:6	<b>recommend</b> 32:15
<b>pivot</b> 32:12	<b>prevent</b> 4:16 22:13	<b>public</b> 18:4	<b>reconsideration</b> 21:26 23:22 28:17 31:12,18 33:11
<b>place</b> 13:9 16:5,16 17:3	<b>prior</b> 24:4 30:16	<b>pump</b> 13:19,26	<b>record</b> 28:17
<b>plain</b> 10:17	<b>Pro</b> 4:5	<b>pumping</b> 27:18	<b>recording</b> 7:11,12
<b>plan</b> 8:21 14:5	<b>procedure</b> 21:25 27:1	<b>purpose</b> 22:20	<b>recoup</b> 25:3
<b>planning</b> 9:10 18:5 19:9	<b>proceeding</b> 24:18	<b>pursuant</b> 15:6	<b>recover</b> 28:8
<b>play</b> 24:5	<b>proceedings</b> 35:26	<b>put</b> 12:6 20:10 31:8	<b>recovered</b> 14:8
<b>playing</b> 19:8	<b>process</b> 16:10 17:2 18:5 32:18	<hr/> <b>Q</b> <hr/>	<b>recovery</b> 27:12
<b>plenary</b> 16:24 17:15	<b>produce</b> 32:26	<b>qualified</b> 15:6	<b>recycled</b> 11:16,26 12:13,16 18:9,13
<b>point</b> 9:24 16:23 19:12 22:13 24:10 25:19 27:9 28:14,15 29:3 32:21 33:4 35:9	<b>produced</b> 12:20 13:1, 2,5,6,7,18,19,24,26 14:12 15:23 18:25	<b>quantities</b> 13:7	<b>redo</b> 22:14,17
<b>points</b> 10:6 26:18 28:3 31:23			<b>reference</b> 10:11
			<b>referencing</b> 9:5
			<b>referring</b> 10:11,21 32:13

Transcript of Proceedings

<b>Regulations</b> 14:2	<b>required</b> 23:8	<b>ruling</b> 10:9 17:23 18:8 19:1,12 25:25 28:22 30:12,13 31:2 35:22	<b>settle</b> 8:10
<b>rejected</b> 25:26 29:1	<b>requirement</b> 15:10	<b>run</b> 16:4	<b>Sevaine</b> 6:26
<b>related</b> 31:11	<b>requires</b> 12:26 22:1 23:13 26:9		<b>share</b> 14:7 28:25
<b>relative</b> 12:24	<b>reread</b> 9:23		<b>Shawnda</b> 3:21 5:12
<b>relevant</b> 10:17	<b>respect</b> 11:24 15:3	<b>S</b>	<b>shifting</b> 18:25 19:5,7
<b>reliance</b> 27:10 32:22, 23	<b>respond</b> 25:13,18,20 26:1,5 29:5 32:2 35:6	<b>S-24</b> 3:3	<b>short</b> 24:6 25:1
<b>relied</b> 27:14 32:25	<b>responded</b> 27:5	<b>safe</b> 23:13	<b>shoulder</b> 16:1
<b>relief</b> 23:1,4	<b>respondent's</b> 25:9	<b>safeguard</b> 16:6,7	<b>sidestep</b> 33:1
<b>rely</b> 16:6,15,18,22 18:4	<b>respondents</b> 4:12,14, 21,23 25:22	<b>safeguards</b> 32:11	<b>significance</b> 30:24
<b>relying</b> 17:26	<b>response</b> 6:4 21:10 26:18 27:22 29:8 35:5	<b>San</b> 3:1 6:26	<b>significant</b> 11:4 12:13 13:11 18:25 20:5 22:22
<b>remand</b> 24:9	<b>responsible</b> 7:23	<b>sanction</b> 22:20 30:2	<b>silent</b> 11:3
<b>reminding</b> 23:20,21 30:26	<b>rest</b> 8:7	<b>sanctionable</b> 30:4	<b>Similarly</b> 24:21
<b>renewed</b> 21:14,24 22:26 28:19	<b>result</b> 18:24 27:15 34:14	<b>sanctioned</b> 22:3	<b>sir</b> 33:16
<b>report</b> 22:23	<b>rethink</b> 23:15	<b>sanctions</b> 22:9 26:8 30:8	<b>sit</b> 20:25
<b>reportable</b> 22:4	<b>reverse</b> 22:7 24:9	<b>satisfied</b> 9:8	<b>site</b> 6:7 7:7,9 8:25 33:26 34:13
<b>reporter</b> 4:5 23:18 33:24	<b>review</b> 9:6 28:22 32:15	<b>saturation</b> 11:10	<b>sites</b> 6:14
<b>reporting</b> 22:10	<b>rewrite</b> 17:4,6,16	<b>Schatz</b> 3:24 5:14	<b>situation</b> 19:4 30:19 31:5
<b>reports</b> 9:12	<b>rights</b> 16:6 24:14 25:10,23 29:15 30:1	<b>schedule</b> 6:17,22	<b>skirt</b> 15:22
<b>represent</b> 15:25 18:22	<b>Rives</b> 4:20	<b>scheduled</b> 7:16	<b>Slater</b> 3:6 5:4 6:8,15, 16 7:4,20 8:6,9,16, 19 9:7,18,19,21 27:25,26 28:1,6 29:18 32:3 34:10,15, 22 35:4,10,11,16,18
<b>representative</b> 23:25	<b>rocio</b> 4:5	<b>scope</b> 24:19	<b>slide</b> 8:20
<b>representatives</b> 7:26	<b>Rosi</b> 33:22	<b>Scott</b> 3:6 5:4	<b>specific</b> 8:26 12:24 13:8 17:9 32:22
<b>represented</b> 28:25	<b>roughly</b> 4:15	<b>section</b> 13:19 14:3 21:25 22:9 23:7 25:11 32:13	<b>specifically</b> 10:26 13:3 20:22 27:4 29:7 32:13
<b>representing</b> 3:5,7,9, 12,14,15,18,20,22, 24 4:1,3	<b>rule</b> 17:18 30:23 33:17	<b>seeks</b> 23:1	<b>spoke</b> 8:4
<b>represents</b> 16:1	<b>rules</b> 14:2 16:5,24 17:1 19:8 20:18,19 25:2	<b>selected</b> 8:2	<b>staff</b> 34:6
<b>request</b> 16:12 17:17 21:13,24 23:17		<b>separate</b> 20:3	
<b>require</b> 22:9 23:7		<b>September</b> 34:25,26 35:8,15	
		<b>Services</b> 3:23 5:13	
		<b>set</b> 23:17 35:7	

Transcript of Proceedings

<p><b>stage</b> 24:18</p> <p><b>stand</b> 18:7</p> <p><b>standards</b> 15:15</p> <p><b>standing</b> 7:8 17:14 18:15</p> <p><b>stands</b> 18:11</p> <p><b>start</b> 4:11 6:6 8:10</p> <p><b>State</b> 4:3 5:24 6:1 22:4,23</p> <p><b>stated</b> 13:18</p> <p><b>states</b> 14:22</p> <p><b>statute</b> 24:13 25:1 29:22 30:7</p> <p><b>step</b> 4:10 17:12</p> <p><b>Steve</b> 5:10</p> <p><b>STEVEN</b> 3:11</p> <p><b>stipulation</b> 9:9 25:23 28:21</p> <p><b>Stoel</b> 4:20</p> <p><b>storage</b> 11:24 13:4,6 27:11,13 28:8</p> <p><b>stored</b> 10:10,14,18, 24 11:1,4,6 12:3,4,6 16:9 20:23 21:4 27:11</p> <p><b>study</b> 32:14</p> <p><b>subject</b> 10:13</p> <p><b>submission</b> 35:21</p> <p><b>submit</b> 16:2</p> <p><b>submits</b> 12:10</p> <p><b>submitted</b> 28:4,6</p> <p><b>subsection</b> 22:1,13</p> <p><b>subsequent</b> 25:23</p> <p><b>suggested</b> 16:23</p> <p><b>suggesting</b> 12:20</p>	<p><b>suit</b> 34:4</p> <p><b>suits</b> 34:3</p> <p><b>supplemental</b> 10:14 11:6,15,24 12:7 16:10 20:23 21:4</p> <p><b>support</b> 21:12 23:9</p> <p><b>surface</b> 11:9</p> <p><b>surrebuttal</b> 33:5</p> <p><b>system</b> 17:25 19:18 20:26 27:19</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p><b>takeaway</b> 17:23</p> <p><b>taking</b> 21:4</p> <p><b>talk</b> 27:10 34:12</p> <p><b>talked</b> 7:15</p> <p><b>talking</b> 4:16 11:16 27:19</p> <p><b>tax</b> 31:4</p> <p><b>taxpayers</b> 18:22</p> <p><b>technical</b> 21:15</p> <p><b>telling</b> 30:10</p> <p><b>Tem</b> 4:5</p> <p><b>tens</b> 15:20</p> <p><b>tentative</b> 9:23,26 10:6 12:5,19 14:20,25 16:4 17:23 18:14 19:10 20:19,22 21:13 26:14,20 28:6, 7</p> <p><b>term</b> 10:19,23 11:12 12:20,23 13:22 14:10</p> <p><b>terms</b> 9:10 10:18 11:8 12:19 32:5,21</p>	<p><b>test</b> 23:1</p> <p><b>thing</b> 9:17 16:22 21:12 23:13 29:20</p> <p><b>things</b> 7:16 26:15,21</p> <p><b>Thomas</b> 3:19 4:22</p> <p><b>thought</b> 6:12 7:19,24 26:4</p> <p><b>thousands</b> 15:21</p> <p><b>thresholds</b> 30:22</p> <p><b>tie</b> 34:4</p> <p><b>time</b> 4:13 6:19,22,24 10:26 11:5,17 12:21 24:6,11,25 25:10 26:10 29:9 30:3 32:24</p> <p><b>timeline</b> 30:18</p> <p><b>times</b> 31:24</p> <p><b>today</b> 8:13,22 9:1 15:19 17:14 18:15 24:7 26:19</p> <p><b>Tracy</b> 3:15 5:18</p> <p><b>transfer</b> 11:20</p> <p><b>transparency</b> 26:24</p> <p><b>treat</b> 12:15</p> <p><b>treated</b> 27:12</p> <p><b>trial</b> 31:5 35:21</p> <p><b>true</b> 22:12</p> <p><b>type</b> 4:13</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p><b>umbrella</b> 13:12</p> <p><b>unaccountably</b> 27:9</p> <p><b>uncertainty</b> 31:21</p> <p><b>underpinnings</b> 30:25</p>	<p><b>understand</b> 18:23 19:9 30:4,21</p> <p><b>understanding</b> 34:20</p> <p><b>understands</b> 10:8</p> <p><b>understood</b> 6:23 28:19 29:1</p> <p><b>Undoubtedly</b> 16:26 24:15 32:6</p> <p><b>unfettered</b> 17:3</p> <p><b>uniform</b> 14:8</p> <p><b>unique</b> 21:2</p> <p><b>unwinding</b> 17:25</p> <p><b>unwinds</b> 18:1</p> <p><b>unwound</b> 19:22</p> <p><b>Utilities</b> 3:18 5:2,21</p> <p><b>utilized</b> 15:16</p> <hr/> <p style="text-align: center;"><b>V</b></p> <hr/> <p><b>Valley</b> 3:21 4:23 5:11 19:14</p> <p><b>Valleys</b> 3:12 15:2</p> <p><b>van</b> 7:5,9,10</p> <p><b>vetted</b> 8:23</p> <p><b>view</b> 7:7 31:20</p> <p><b>viewing</b> 6:20</p> <p><b>violation</b> 31:13</p> <p><b>virtually</b> 23:4</p> <p><b>visit</b> 6:7,12 7:21 33:26 34:13,16,18</p> <p><b>Vista</b> 3:6 5:6,7</p> <p><b>voluminous</b> 24:17</p> <p><b>voluntarily</b> 15:12</p>
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

Transcript of Proceedings

<hr/> <p><b>W</b></p> <hr/> <p><b>wait</b> 26:2</p> <p><b>waiting</b> 35:4</p> <p><b>walk</b> 7:3,6</p> <p><b>wanted</b> 25:10 28:25 29:1,2 34:12</p> <p><b>water</b> 3:12,20,21 4:23,24 5:7,11 10:13,14,15,18,22, 23,24 11:1,4,6,9,14, 15,16,20,23,26 12:3, 6,7,13,16,23 13:1,2, 5,6,18,19,23,24,25 16:9,10 18:2,6,9,13, 14,25 19:14 20:6,20, 21,23,26 21:4 27:11, 17 32:26</p> <p><b>watermaster</b> 3:8 4:9 5:5,17 6:7 12:4,11, 14 13:1,3,5,15 14:2, 3,8 16:8,23,26 17:2, 3,12,15 19:13,23 25:2 27:13 32:8,16</p> <p><b>watermaster's</b> 15:8 16:3 17:11 35:9</p> <p><b>we'e</b> 24:9</p> <p><b>weekend</b> 35:24</p> <p><b>weeks</b> 29:7</p> <p><b>weigh</b> 28:15</p> <p><b>weighed</b> 29:12</p> <p><b>whatnot</b> 31:16 32:10</p> <p><b>wishes</b> 22:11</p> <p><b>withdraw</b> 26:11</p> <p><b>withdrawal</b> 12:19,21 13:9 14:4 27:13</p> <p><b>withdrawn</b> 13:2</p>	<p><b>wondering</b> 6:12 7:18</p> <p><b>word</b> 13:25 14:10</p> <p><b>work</b> 18:20,21 26:22, 24,26 27:19</p> <p><b>worked</b> 27:2</p> <p><b>writing</b> 29:6</p> <p><b>written</b> 14:17 29:8</p> <p><b>wrote</b> 14:15</p> <hr/> <p style="text-align: center;"><b>Y</b></p> <hr/> <p><b>year</b> 14:10 20:7 25:24,25 31:9,14</p> <p><b>years</b> 15:21 16:5 19:18 26:23 27:9</p> <p><b>yesterday</b> 8:24</p> <hr/> <p style="text-align: center;"><b>Z</b></p> <hr/> <p><b>zone</b> 11:9</p> <p><b>Zoom</b> 3:6,8,10,13,19, 23,26 4:3 5:3 21:17</p>
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------