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10 **CHINO BASIN WATERMASTER**

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
12 **FOR THE COUNTY OF SAN BERNARDINO**

13 **CHINO BASIN MUNICIPAL WATER**  
14 **DISTRICT**

15 **Plaintiff,**

16 **vs.**

17 **CITY OF CHINO, ET AL.**

18 **Defendant.**

**Case No. RCV 51010**

[Assigned for All Purposes to the  
Honorable MICHAEL GUNN]

**WATERMASTER COMPLIANCE WITH  
DECEMBER 21, 2007 ORDER  
CONDITIONS ONE AND TWO**

**Date: May 1, 2008**  
**Time: 2:00 pm**  
**Dept: R8**

19 **I. INTRODUCTION**

20 In its Order approving the Peace II Measures and directing Watermaster to proceed in  
21 accordance with Watermaster Resolution 07-05, the Court set forth several conditions subsequent,  
22 the first two of which are relevant to this pleading. The first condition was that Watermaster,  
23 õprepare and submit a brief to explain the amendments to Judgment Paragraph 8 and Exhibit -G.õ  
24 This request arises out of concerns expressed by the Special Referee regarding interpretation of the  
25 amendments in the event of future conflicts regarding their intended meaning.

26 The second condition subsequent arises from a request that Watermaster substitute an Initial  
27 Schedule that comports with the parameters of the Judgment Amendment to Exhibit õlõ with the  
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1 quantity of controlled overdraft being limited to a cumulative maximum of 400,000 acre-feet. This  
2 filing is more ministerial in character in that the November 15, 2007 Final Report prepared by Mr.  
3 Wildermuth analyzed the proposed "Initial Schedule" within the Project Description offered under  
4 the Paragraph 7.2(a) of the Peace II Agreement and simply predicted results differing from those  
5 authorized under the Amendment to Exhibit "I." Accordingly, Watermaster has attached a revised  
6 Initial Schedule described by Mr. Wildermuth in his testimony on November 29, 2007 to comport  
7 with: (a) the limitations of the Exhibit I (400,000 maximum); and (b) the model predictions  
8 generated by Mr. Wildermuth in his supplemental technical evaluations when capping the quantity  
9 of controlled overdraft at 400,000 acre-feet.

## 10 II. BACKGROUND HISTORY

11  
12 On October 25, 2007, Chino Basin Watermaster ("Watermaster") filed a *Motion for Approval*  
13 *of Peace II Documents* ("Motion"). The Peace II Documents are a suite of agreements, reports, and  
14 amendments to previous documents, including the 1978 Judgment, that implement a series of actions  
15 to continue the implementation of the physical solution for the Chino Basin which is known as the  
16 Optimum Basin Management Program ("OBMP"). Watermaster noticed a hearing on this Motion for  
17 November 29, 2007.

18 On November 15, 2007, the Court issued an *Order to Show Cause Why Court Should Not*  
19 *Continue Hearing on Motion for Approval of Peace II Documents*.

20 The Special Referee Anne Schneider performed an exhaustive review of the Peace II Documents.

21 On November 27, 2007, the Special Referee filed the *Special Referee's Preliminary Comments and*  
22 *Recommendations on Motion for Approval of Peace II Documents* ("Preliminary Comments").

23 On November 29, 2007, Watermaster appeared in Court and presented evidence in response  
24 to the Preliminary Comments and in support of its Motion. In addition, on December 14, 2007,  
25 Watermaster filed a *Watermaster Response to Special Referee's Preliminary Comments and*  
26 *Recommendations on Motion for Approval of Peace II Documents* ("Watermaster Response").

27 On December 20, 2007, the Special Referee filed the *Special Referee's Final Report and*  
28 *Recommendations on Motion for Approval of Peace II Documents* ("Final Report"). On December

1 21, 2007, the Court issued its *Order Concerning Motion for Approval of Peace II Documents*  
2 (‘‘Order’’). The Order granted the various items requested for approval in Watermaster’s Motion, but  
3 included a list of nine conditions subsequent. The first two of these conditions subsequent and the  
4 ones relevant to this pleading are:

- 5 1. By February 1, 2008, Watermaster shall prepare and submit to the Court a  
6 brief to explain the amendments to Judgment Paragraph 8 and Judgment  
7 Exhibit ‘‘G.’’  
8
- 9 2. By February 1, 2008, Watermaster shall prepare and submit to the Court for  
10 approval a corrected initial schedule to replace Resolution No. 07-05  
11 Attachment ‘‘E,’’ together with an explanation of the corrections made.

### 12 III. FIRST CONDITION SUBSEQUENT

#### 13 A. The Pleading Responds to the Special Referee’s Explanation of the Proposed 14 Amendments to Aid the Court in Interpretation of the Amendments. 15

16 The Special Referee’s Preliminary Comments initially raised several issues regarding the  
17 proposed Judgment Amendments to Paragraph 8 and Exhibit G and requested Watermaster to  
18 provide further responses. Watermaster responded by providing testimony, argument and further  
19 briefing on the identified subjects.  
20

21 Following hearing and subsequent briefing, the Special Referee’s Final Report characterized  
22 her earlier Preliminary Comments as raising three general issues: (1) the submittal of evidence and  
23 explanation as to why the additional amendment was required seven years following the previous  
24 amendment; (2) legal questions that required further explanation to assist the Court in interpretation  
25 of the amendments; and (3) the need for a thorough explanation of the apparent complete removal of  
26 the appurtenance requirement related to the Overlying (Non-Agricultural) Rights.<sup>1</sup>

27 <sup>1</sup> As is the case with the Agricultural Pool, the Overlying (Non-Agricultural) Pool is often referenced  
28 simply as the ‘‘Non-Agricultural Pool.’’ This form of reference is not intended as a commentary on  
the overlying status of the pool.

1 The Final Report characterized the evidence and argument provided by Watermaster as  
2 largely responsive to the questions previously identified by the Special Referee. In providing a  
3 context for the recommendation for further briefing the Final Report states: "Watermaster addresses  
4 most of the specific questions related to the proposed Judgment Amendments." (Final Report at p.  
5 12:11-12) Moreover, as to the need for the amendment, the Final Report acknowledges that:

6  
7 "Given that more than 52,000 acre-feet of water is being held in storage by the  
8 members of the Non-Agricultural Pool, it is clear that previous efforts to  
9 encourage and facilitate water transfers to Watermaster from the Overlying  
10 (Non-Agricultural) Pool have not worked to alleviate the build-up in storage."  
11 (Final Report at p. 14.)

12  
13 Watermaster contends that the plain meaning of the instruments should be the primary  
14 consideration in interpretation of the instruments. However, to the extent there is unintended  
15 ambiguity or the Court desires a greater appreciation for the context of the amendments, this  
16 pleading provides an explanation of the mechanics of how the proposed amendments are to be  
17 construed and implemented below in Section IIB. For convenience of the Court, a brief summary of  
18 Watermaster's earlier responses to the specific subjects initially identified for further explanation in  
19 the Preliminary Comments are also set forth in Section IIC below.

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21 **B. The Proposed Amendments Provide an Integrated and Equitable Approach to**  
22 **Provide Local Water to Watermaster and Members of the Appropriate Pool to**  
23 **Offset Potential Replenishment Obligations.**

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25 1. **The Peace II Measures Seek to Augment Opportunities for Maximizing**  
26 **Reasonable and Beneficial Use While Fairly Balancing Competing**  
27 **Considerations.**

1 The amendment to Judgment Paragraph 8 (attachment H to Watermaster Resolution 07-05)  
2 adds a third option for the potential transfer and conveyance of water from the Non-Agricultural  
3 Pool to maximize prospects for reasonable and beneficial use. Specifically, the amendment provides  
4 in relevant part:

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6 All overlying rights are appurtenant to the land and cannot be assigned or conveyed  
7 separate or apart there from for the term of the Peace Agreement except that the  
8 members of the Overlying (Non-Agricultural) Pool shall have the right to Transfer or  
9 lease their quantified Production rights: (i) within the Overlying (Non-Agricultural)  
10 Pool; (ii) to Watermaster in conformance with the procedures described in the Peace  
11 Agreement between the Parties therein, dated June 29, 2000; *or (iii) in accordance*  
12 *with the Overlying-(Non-Agricultural) Pool Pooling Plan set forth in Exhibit*  
13 *“G”*(emphasis added).

14  
15 The first option of assigning water rights within the Non-Agricultural Pool was permitted  
16 under the original Judgment. The alternative of transferring water to Watermaster in connection  
17 with a storage and recovery project or for desalter replenishment was made possible in 2000 with the  
18 Court’s approval of the Peace Agreement and related instruments, including an amendment to  
19 Paragraph 8.

20 This alternative (ii) was added in 2000 to provide a controlled outlet for Non-Agricultural  
21 Pool members in an effort to provide additional flexibility to Watermaster and the parties. The  
22 change was necessary to avoid un-pumped groundwater accumulating in individual storage accounts.  
23 Unlike un-pumped Agricultural Pool water rights, under the Judgment, there was no provision for  
24 un-pumped water to automatically revert to the Appropriative Pool, other than through an agreement  
25 with an appurtenant appropriator that assumed water service responsibility to the designated  
26 overlying property, Non-Agricultural Pool water had to be used by members of the Non-Agricultural  
27 Pool.

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1           However, the 2000 amendment did not completely liberate the Overlying Right for transfer.  
2 The parties to the Judgment were divided as to the extent that transfers should be permitted.  
3 Competing management concerns were raised regarding the implications of expanded transferability,  
4 including but not limited to, the accumulation of stored water, reliance of the parties on historical  
5 assignments, equitable access to the supply, discrepancies in historical treatment, economics, and  
6 legal barriers. Ultimately a compromise position was reached that created an outlet that did not  
7 favor any specific group of potential users. By limiting the eligible purchaser to Watermaster and  
8 for a limited purpose (storage and recovery and/or desalter replenishment), the 2000 Amendment  
9 secured unanimous support by the parties. This followed from the view that not only would the  
10 members of the Non-Agricultural Pool obtain an outlet, the Watermaster, on behalf of the parties to  
11 the Judgment, would ensure that the obtained water would be for the common benefit of the  
12 Appropriative Pool. Use of the water to avoid a desalter replenishment obligation was deemed a  
13 general Watermaster obligation (the apportionment of which remained a contentious issue until the  
14 Court's approval of the Peace II Measures). Likewise use of the stored water in connection with a  
15 storage and recovery program triggered a broad regional benefit requirement.

16           In this way, under the 2000 Amendment, regardless of whether water acquired by  
17 Watermaster was used in connection with a storage and recovery program or for desalter  
18 replenishment, equitable access to the benefits created by the liberated water could be reasonably  
19 assured. Thus, the 2000 Amendment enhanced the potential for beneficial use but did not unfairly  
20 prejudice any party's ability to enjoy the benefits of increased transferability. Watermaster returned  
21 to these considerations in crafting the Peace II Measures. It is important to restate that the option of  
22 providing water to Watermaster under the 2000 amendment to Exhibit "G" is preserved. As written,  
23 the Peace II Measures and the amendment to Exhibit "G" augment the earlier options; it does not  
24 replace them.

25           2.       **The Peace II Amendments to Exhibit "G" Set Forth Rules and**  
26                   **Procedures that Prioritize and Control the Use of Water Made Available**  
27                   **from the Non-Agricultural Pool.**  
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1 In its initial form, Exhibit 8G8 to the Judgment set forth organizational arrangements among  
2 the members of the Non-Agricultural Pool. As amended, Exhibit 8G8 provides an elaborate set of  
3 rules and procedures pursuant to which stored water will be made available consistent with the  
4 purposes of maximizing beneficial use through equitable access to the water made available.  
5 Facilitating beneficial use and enhancing Watermaster flexibility in managing stored water looms as  
6 an even more important goal than originally articulated when Watermaster sought approval of the  
7 2000 Amendment, largely because of Watermaster8s desire to efficiently implement its objective of  
8 securing Hydraulic Control.

9 The suite of changes included within Exhibit 8G8 can be grouped into three subjects: (a)  
10 those that address water already held in storage as of identified dates; (b) those that address water  
11 that is annually made available by the members of the Non-Agricultural Pool; and (c) those that  
12 established conditions that provide economic and policy conditions to the enjoyment of the financial  
13 benefits created by the amendment and the expanded rights of transferability.

14  
15 **(a) Physical Solution Transfers from Storage as of June 30, 2007.**

16 Under Paragraph 9, each member of the Non-Agricultural Pool obtains the *discretionary*  
17 *right* and not the obligation to make water available for a Physical Solution transfer consistent with  
18 the three options authorized under Paragraph 8 discussed above. As for the quantities held in storage  
19 as of June 30, 2007 (less the special transfer quantity), the members of the Non-Agricultural Pool  
20 have exercised their discretion to option the water to Watermaster under the defined terms of the  
21 *Purchase and Sale Agreement for the Purchase and Sale of Water by Watermaster from the*  
22 *Overlying (Non-Agricultural) Pool* (8Purchase and Sale Agreement8). Accordingly, the members of  
23 the Non-Agricultural Pool have exercised their discretion to make the water available to  
24 Watermaster, and Watermaster now has discretion under the defined terms of the option to obtain the  
25 water for use either in connection with a storage and recovery project or for desalter replenishment.

26  
27 The option gives Watermaster two years from the date of the Court8s approval of the Peace II  
28 Measures (December 21, 2009) to evaluate whether it requires the water for the potential purposes.

1 Both Watermaster and the members of the Non-Agricultural Pool are provided certainty of financial  
2 terms with a negotiated incremental increase in the price for water and further adjusted by CPI as a  
3 hedge against inflation.

4 In the event that Watermaster *does not* exercise its option to purchase the water held in  
5 storage and Watermaster and the members of the Non-Agricultural Pool do not mutually agree to  
6 otherwise extend the date of the option, then the stored water will be made available for purchase by  
7 the members of the Appropriative Pool under the procedures set forth in the Judgment Amendment  
8 Paragraph 9(iv) (*Purchase and Sale Agreement Paragraph 8*) that is applicable to annual quantities  
9 made available for purchase by the members of the Non-Agricultural Pool. In this way, the total  
10 quantity held in storage as of June 30, 2007 will be purchased by Watermaster at its discretion or  
11 acquired by the members of the Appropriative Pool under the process described in Paragraph (b)  
12 below.

13 The special transfer quantity creates an earmark for the purchase of 8,530 acre feet by San  
14 Antonio Water Company (‘‘SAWCO’’) from Vulcan Materials that is expressly deducted from the  
15 quantity available for Watermaster, or in the event Watermaster does not exercise the option to the  
16 members of the Appropriative Pool. As noted in the Final Report, this earmark of a specific quantity  
17 results in a deduction from the June 30, 2007 storage quantity. However, it is also adjusted for a ten  
18 percent dedication to desalter replenishment as is the case for the transfer of all water from storage  
19 under the Purchase and Sale Agreement. (Purchase and Sale Agreement Paragraph B.)

20 The earmark and the dedication were a component of the overall financial equity that was  
21 deemed necessary to authorize the transfer of stored water and the amendments to Paragraph 8 and  
22 Exhibit ‘‘G’’ specifically and to secure support for the Peace II Measures. The earmark helped to  
23 address concerns expressed over the delays between the time the original financial terms were  
24 negotiated for the Purchase and Sale Agreement and the time at which the option may be finally  
25 exercised by Watermaster or the water is acquired by members of the Appropriative Pool.

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**(b) Physical Solution Transfers of Water Stored After June 30, 2007.**

With regard to water that the members of the Non-Agricultural Pool may make available from time to time, Exhibit 8Gö set forth a set of rules and procedures for how Watermaster will acquire the water made available by the members of the Non-Agricultural Pool and then make it available on an equitable basis to the members of the Appropriative Pool. (Judgment Amendment Exhibit 8Gö 9(a)-(g).) The conditions establish the time at which the water is made available, the process of distributing the water among the members of the Pool and the price for the water.

However, it should be noted that there is no requirement that Watermaster purchase the water made available and any unsubscribed quantities will be apportioned back among the members of the Non-Agricultural Pool in proportion to the amount each member made available (Paragraph 9(e).) Consequently, the un-purchased water may subsequently be made available in accordance with the processes authorized by Paragraph 8, including the purchase by Watermaster in connection with a storage and recovery project or desalter replenishment.

Through these procedures the future avoidance of large accumulations of unused water accruing to the members of the Non-Agricultural Pool can likely be avoided under terms that are considered fair to the members of the Non-Agricultural Pool and the Appropriative Pool and consistent with the policy objectives of Watermaster.

**(c) Conditions on Transfer that Facilitate the Policy Objectives of the Peace II Measures and Redress Concerns Regarding Historic Inequities and Party Reliance on Assignments.**

Exhibit 8Gö establishes conditions on the transferability that will operate to advance broader Watermaster objectives. These include conditions on the ability of members of the Appropriative Pool to purchase their proportionate share of water made available by members of the Non-Agricultural Pool. (Amendment to Exhibit 8Gö paragraph 9(f).)

Namely, this includes the requirement that the respective appropriator purchaser is current in the applicable assessments and in compliance with the OBMP. As for participation by members in

1 the Non-Agricultural Pool, Watermaster must make a finding that they are making use of recycled  
2 water where it is "physically available and appropriate." Collectively, this means that both the seller  
3 and buyer must be working together to support the implementation of the OBMP generally and the  
4 beneficial use of recycled water.

5 As a condition of the Non-Agricultural Pool obtaining more extended rights of  
6 transferability, Section 5 of Exhibit "G" establishes an annual dedication of water from the members  
7 of the Non-Agricultural Pool to be used by Watermaster to offset the annual replenishment  
8 obligation for desalter production. Each member of the Non-Agricultural Pool will dedicate ten  
9 percent of its respective annual share of Safe Yield to Watermaster. (Exhibit "G" paragraph 5(c)(1).)  
10 In the event that the party does not dedicate the supply, Watermaster may levy an assessment against  
11 the member equal to the Metropolitan Water District replenishment rate for ten percent of the party's  
12 respective right to Safe Yield.

13 To the extent Watermaster does not require the water to offset desalter production, then  
14 Watermaster will make the dedicated water available to members of the Appropriative Pool.  
15 Accordingly, the dedication by Non-Agricultural Pool is complete as there is no possibility that the  
16 dedicated water will be unused.

17 It must be underscored that this dedication is not imposed in a vacuum divorced from the  
18 substantial economic benefits that are received by the Non-Agricultural Pool Sellers through more  
19 liberal transfer rules, the water supply and economic benefits enjoyed by the members of the  
20 Appropriative Pool that will receive the right to purchase stored water (pre and post-June 30, 2007),  
21 and the significant projected burdens associated with meeting desalter replenishment obligations  
22 over the useful life of those facilities.

23 The members of the Appropriative Pool may be required to fund substantial recharge  
24 improvements in the decades ahead as Watermaster effectuates the Basin Re-Operation strategy and  
25 secures Hydraulic Control. There will also be a responsibility for meeting any replenishment  
26 obligations attributable to the Desalters. Through the dedication, Non-Agricultural Pool members  
27 will be directly contributing towards that obligation.

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3. **Summary Responses to the Questions Raised by the Referee in the Preliminary Comments.**

(a) **Why are the amendments necessary?**

The preceding discussion addresses the larger perspectives as to the rationale for the Amendments and why they will operate in furtherance of Watermaster objectives. The Final Report notes that: “Given that more than 52,000 acre-feet of water is being held in storage by the members of the Non-Agricultural Pool, it is clear that previous efforts to encourage and facilitate transfers to Watermaster from the Overlying (Non-Agricultural) Pool have not worked to alleviate the build-up in storage.” (Final Report 14:5-8.)

The build-up is probably the reflection of two external conditions. As acknowledged by the Final Report, to date, Watermaster has had adequate sources of water to meet the replenishment needs of the Desalters. Consequently, there has not been a need by Watermaster for the Non-Agricultural Pool water in storage for Desalter replenishment purposes. How Watermaster and the parties to the Judgment consider proposed modifications to the initial schedule for use of Controlled Overdraft pursuant to Exhibit “I” as well as the Recharge Master Plan may have some impact on whether Watermaster exercises its option to purchase the stored water under the Purchase and Sale Agreement. However, until the Court authorized the Peace II Measures, uncertainty clouded whether Watermaster should attempt to purchase the water.

Second, Watermaster has been in the process of seeking partners for a Storage and Recovery Program to makes use of the water, but no such projects have yet moved toward implementation. It is noted that under the Purchase and Sale Agreement, the first priority for disposition of the water will continue to be for use in a Storage and Recovery Program, and it is likely that it is only if such a project does not materialize that the water will be allocated to the members of the Appropriate Pool. (Purchase and Sale Agreement paragraph C and H.)

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**(b) What are the total quantities of water involved in the proposed transfers?**

The total quantities of Non-Agricultural Pool water held in storage as of June 30, 2007 is 51,476.147 acre-feet. The quantity provided for the Special Transfer between Vulcan and SAWCO is 8,530 acre-feet.

**(c) Do the proposed amendments remove the appurtenance requirement and what are the consequences of elimination?**

The Judgment amendments to Paragraph 8 and Exhibit "G" will relax the restrictions upon the use of Non-Agricultural Pool water and will therefore hopefully allow the water to be put to beneficial use consistent with Article X, section 2 of the California Constitution. The Special Referee opines that, "these amendments will essentially complete the transformation of the Overlying (Non-Agricultural) Pool rights from overlying to transferable rights." (Final Report 11:15-17.) However, for the reasons noted above, Watermaster respectfully disagrees.

While the Non-Agricultural Pool water may be made available to the members of the Appropriative Pool, the terms of such a transfer are dictated by the Judgment amendments both as to process and as to price. There is a substantial difference between this and the free transferability that the members of the Appropriative Pool enjoy among themselves where market transfers can be consummated under terms and conditions freely dictated by the parties to the transfer.

**(d) Is intervention into the Non-Agricultural Pool as allowed by the Peace II Agreement section 4.4 inconsistent with Exhibit "G" paragraph 6?**

Exhibit "G" paragraph 6 of the Judgment states that, ". . . any appropriator who may, directly or indirectly, undertake to provide water service to such overlying lands may, by an appropriate agency agreement on a form approved by Watermaster, exercise said overlying right to the extent, but only to the extent necessary to provide water service to said overlying lands . . ." This provision of the Judgment is designed to allow flexibility as between an Appropriator and Non-

1 Agricultural Pool member when, for whatever reason, it would be more convenient for the Non-  
2 Agricultural Pool member to receive its water from the appropriator rather than by pumping it  
3 directly from the Basin. In this regard, the terms of the Judgment provision relate solely to ensuring  
4 that no more water is pumped than would be pumped if the Non-Agricultural Pool member was  
5 pumping the water itself.

6 The Peace II Agreement section 4 addresses a different situation. This provision is intended  
7 for the situation where an appropriator such as a city itself meets the legal requirements as an  
8 overlying landowner. As a matter of general law, by acquisition, succession and assignment,  
9 persons may enjoy a number of water rights. Indeed there are instances where a person may hold  
10 appropriative, riparian, overlying and prescriptive water rights and multiple rights to a single source  
11 of supply. Evidence of this general condition can already be found in the Judgment. That is, a party  
12 to the Judgment already enjoys status in two Pools. The County of San Bernardino is a member of  
13 the Non-Agricultural Pool with reference to its water use at the Chino Airport, and it is also a  
14 member of the Appropriative Pool with reference to its water use at the Prado Shooting Park.

15 Moreover, in the instant case, to the extent a party meets the qualifications for intervention  
16 into the Non-Agricultural Pool, they should be allowed to intervene. It is of no legal significance  
17 that they may occupy or enjoy rights derived from another Pool as well.

18 The integrity of the Safe Yield allocation to the Non-Agricultural Pool is not threatened by  
19 the intervention per se. This follows from the fact that the total availability of water allocated to the  
20 Non-Agricultural Pool is established by the Judgment. No amount of interventions can expand the  
21 quantity that may be cumulatively produced by the group of eligible users. Intervention per se, does  
22 not vest the intervening party with water rights. They must acquire them.

23 It is true that since the Peace Agreement, intervention into the Non-Agricultural Pool creates  
24 the opportunity to acquire Non-Agricultural Pool rights. Given that the appurtenance of Non-  
25 Agricultural Pool rights was modified to allow those rights to be transferred between parcels of  
26 overlying land, there is no apparent reason why a party that owns overlying land and beneficially  
27 uses water on that property for overlying purposes should not be able to intervene into the Pool and  
28 be an available transferee for previously perfected rights.

1 The Preliminary Report notes that intervention into the Non-Agricultural Pool has been  
2 allowed in the past. (Preliminary Comments 20:25.) Indeed, two current members of the Non-  
3 Agricultural Pool (General Electric Corporation and Loving Savior of the Hills Lutheran Church)  
4 intervened into the Pool with no water rights. Moreover, while it true that as the Special Referee  
5 indicates that intervention into the Non-Agricultural Pool has never been allowed for members of  
6 other Pools, it is important to also note that neither has such intervention ever been prohibited, and  
7 Paragraph 60 of the Judgment does not preclude it.

8 Paragraph 60 provides that a non-party assignee of an appropriative rights may intervene into  
9 the Appropriative Pool, and then indicates that any other party proposing to newly produce water  
10 from the Basin may intervene into other pools. An appropriator that seeks to produce water as a  
11 member of the Non-Agricultural Pool would be required to produce that water under a right acquired  
12 from another party. In other words, the water is not being newly produced.

13 Perhaps there may be ancillary governance considerations that arise for the Nine-Member  
14 Board if an intervening appropriator assumed a position of simultaneous dominance in both the  
15 Appropriative Pool and the Non-Overlying Pool. However, such a situation is not presented by the  
16 prospect of intervention alone and is more properly addressed as a question of governance.

17  
18 (e) **Do the proposed Judgment amendments allow the one-time**  
19 **transfer?**

20 This issues is addressed by Watermaster at length in its Response (Watermaster Response to  
21 Preliminary Comments of Referee at page 38), and again above in Section B of this pleading. The  
22 Judgment amendments do provide approval of the one-time transfer as a component of the overall  
23 package of approvals that are believed to provide balanced and fair terms for liberating the water  
24 stored within the Non-Agricultural Pool as of June 30, 2007.  
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**(f) What is the MWD Replenishment rate?**

The MWD Replenishment rate is the rate that is charged by the Metropolitan Water District for replenishment water. The MWD Replenishment Rate is a published rate that has evolved historically in reflection of overall conditions of supply availability.

There is no present ambiguity as to this specific term. For 2008, the MWD Replenishment rate is \$258 an acre-foot not inclusive of any MWD member agency (IEUA, TVMWD or WMWD) surcharges. In the event MWD should eliminate the rate, replace it or engage in substantial restructuring of its rate-structure, the parties would need to develop a substitute definition of the benchmark for the price term.

**(g) What is the explanation for the special earmark transfer between Vulcan Materials and San Antonio Water Company?**

This subject is addressed at length above in Section B of this pleading. In summary, the Purchase and Sale Agreement addresses the total quantity of water held in storage by the members of the Non-Agricultural Pool as of June 30, 2007. (Purchase and Sale Agreement paragraph B.) Generally, the stored water is to be used first for either Desalter Replenishment or for use in a Storage and Recovery Program. (*Id.* at paragraph C.) The amount of water so used shall be the amount held in storage as of June 30, 2007, less the ten percent dedication to be used for Desalter replenishment, less the quantity of water transferred pursuant to paragraph I of the agreement.

Paragraph I of the Purchase and Sale Agreement describes a negotiated agreement between Vulcan Materials Company and its retail water provider San Antonio Water Company relating to Exhibit 6 paragraph 6 of the Judgment, which permits the assignment of rights by a member of the Non-Agricultural Pool to the appropriator which serves that member. As part of the negotiation of the Peace II measures, the parties unanimously consented to this earmark as a carve-out from the overall quantity of water to be transferred from the Non-Agricultural Pool to Watermaster.

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**(h) Where does the “Special Project OBMP Assessment” that is paid by a pool member in money rather than water go for the first ten years?**

The distribution of the Special Project OBMP Assessment for the first ten years is governed by section 9.2 of the Peace II Agreement. This section specifies that the allocation of any water or financial equivalent shall be distributed according to the formula contained in that section.

**(i) Can the OBMP Special Project Assessment be construed as a reallocation of Safe Yield in contravention to the Judgment?**

As Watermaster explained in its December 14, 2007 Reply, this assessment is first a voluntary dedication in exchange for alienability. However, there is no requirement that the party dedicate the supply. For every member of the Non-Agricultural Pool that does not make the dedication, Watermaster may levy a monetary assessment based on the party’s share of Safe Yield, just as are many Watermaster assessments. Moreover, the rights of the Appropriative Pool do not swell commensurately with the dedication.

The dedication must be used for desalter replenishment to offset a specific obligation. If there is no desalter replenishment obligation the water will be made available to the identified parties in the quantities set forth in the Peace II Agreement section 9.2. The Non-Agricultural Pool member is given the option in any given year to pay the assessment in water rather than money, and for the first ten years at least, the members of the Appropriative Pool do not realize benefits in direct proportion to their respective shares of Operating Safe Yield. Accordingly, the amendment cannot be construed as a reallocation of rights to Safe Yield.

**(j) How are the proposed transfers reconciled with the fact that Watermaster’s powers do not seem to include the power to acquire or dispose of water rights?**

1 Watermaster has the power to administer the Judgment and to purchase water. It is this  
2 power which allows Watermaster to perform its fundamental function of purchasing water for the  
3 purpose of replenishment of the Basin. Similarly, as described above, the transfers at issue here,  
4 though sometimes colloquially referenced as a transfer of rights, really involve the transfer of water  
5 (or its financial equivalent) for the benefit of the parties, and not of the rights themselves. Nowhere  
6 does Watermaster propose to unilaterally beneficially use any of the water acquired. In every case, it  
7 must make the water available for use in the manner specified.

8 With respect to each of the Non-Agricultural Pool transfers described in the Peace II  
9 Documents, the Non-Agricultural Pool member retains the actual adjudicated rights to the water with  
10 Watermaster acting in the nature of an escrow agent following the prescribed procedures for  
11 distribution of the water among the members of the Appropriative Pool or to offset desalter  
12 replenishment.

13 Where Watermaster is involved in a transfer it acts in the role of an intermediary, either to  
14 arrange for the allocation of the water to the members of the Appropriative Pool, or to dedicate the  
15 water as Desalter replenishment where it will serve to replenish the supply of the Basin to be  
16 available to all parties. In other words, it is acting in a capacity that has been a traditional function of  
17 Watermaster and essential to the maintenance of the Physical Solution..

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19 **IV. SECOND CONDITION SUBSEQUENT**  
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21 Section 7.2(e)(i) of the Peace II Agreement required Watermaster to file a proposed initial  
22 schedule for use of the Controlled Overdraft authorized under Exhibit 010 to the Judgment  
23 concurrent with the adoption of Resolution 07-05. Watermaster adopted an initial schedule and filed  
24 it with the Court on October 25, 2007. When modeling the impacts of the Project Description that  
25 used the initial schedule, Mr. Wildermuth's analysis in his Final Report predicted that more than  
26 400,000 acre-feet would be withdrawn as Controlled Overdraft. This analysis, while useful to  
27 examining whether Basin Re-Operation would cause Material Physical Injury, demonstrated that the  
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1 initial schedule was too aggressive in its assumptions regarding the availability of New Yield in the  
2 earlier years of Basin Re-Operation.

3 At the November 29, 2007 Hearing, Mr. Wildermuth testified to changes to the initial  
4 schedule regarding use of the 400,000 acre-feet of controlled overdraft pursuant to Basin Re-  
5 Operation. Mr. Wildermuth testified that model results suggested that the previous estimates of New  
6 Yield due to inflow from the Santa Ana River had been underestimated and that the new estimates  
7 require an alteration of the initial schedule. The previous initial schedules for Alternatives 1A and  
8 1B used a New Yield of 30% of desalter pumping. This assumption was based upon calculations  
9 made for the 2005/2006 Watermaster assessment package. For Alternative 1C, the New Yield was  
10 determined based on the updated model. Using the updated model, iterations were completed to  
11 solve for New Yield from the Santa Ana River.

12 Mr. Wildermuth included the revised schedule in his testimony exhibits and as Table 1 in his  
13 December 18, 2007 Report (filed with the Court on December 19, 2007). A copy of this revised  
14 initial schedule is attached here as Exhibit ðA.ö This substitution is not offered in lieu of the  
15 requirement that Watermaster provide a revised initial schedule, if required following the completion  
16 of negotiations between WMWD and the members of the Appropriative Pool.

## 17 V. CONCLUSION

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19 The provisions of the Peace II Documents relating to the Non-Agricultural Pool are designed  
20 to maximize the use of water available to the Basin consistent with Article X, section 2 of the  
21 California Constitution. Collectively, these provisions were developed through negotiation of the  
22 parties and have the unanimous support of the parties to the Judgment.

23 There are strong management and policy considerations that are reflected in the  
24 conditionality associated with more liberal transfer rules that fairly balance a host of competing  
25 considerations. While the weight given to each of the numerous considerations may vary based  
26 upon interest and point of view, from the perspective of Watermaster, the amendments provide  
27 Watermaster with a two-year option of acquiring water from storage at a fixed price for designated  
28 purposes of desalter replenishment and storage recovery through a period of transition.

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If these larger opportunities cannot be realized, the purchased water can nevertheless be made available as a local supply to all appropriators in lieu of replenishment under terms deemed fair by the members of the Appropriative Pool. It is true that the amendments will provide for some opportunities for isolated economic gain along with the increased beneficial use.

However, this is traditionally the case with the beneficial use of water. More importantly, given the Herculean commitments undertaken by Watermaster and the parties in implementing Basin Re-Operation and Hydraulic Control efforts, the amendments add to the foundation of broad, indeed unanimous support without posing any specific threat of harm to any party or the Basin.

Dated: January \_\_\_\_\_, 2008

BROWNSTEIN HYATT FARBER  
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By: **DRAFT** \_\_\_\_\_

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