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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 J. MICHAEL GUNN]

**WATERMASTER'S RESPONSE TO
COMMENTS OF SPECIAL REFEREE ON
WATERMASTER COMPLIANCE WITH
DECEMBER 21, 2007 ORDER
CONDITIONS 1 THROUGH 4**

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

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22 **I. INTRODUCTION**

23 On December 21, 2007, the Court issued its *Order Concerning Motion for Approval of Peace*
24 *II Documents* (õPeace II Orderö). The Order approved Watermaster's October 27, 2007, *Motion for*
25 *Approval of Peace II Documents* subject to nine conditions subsequent. To a large extent these
26 conditions consolidated substantive commitments made by Watermaster and the Parties through
27 various legal instruments comprising the Peace II Documents.

1 Pursuant to the Order, Conditions One through Four were to be fulfilled by April 1, 2008.
2 Unlike those filings and approvals that were derived from the Peace II Documents, Conditions Two
3 and Three arise solely from the Court Order. This Court set for hearing for May 1, 2008 at 2:00 pm
4 for the purpose of reviewing the responses to the conditions and to approve the responses to
5 Conditions Two and Three.

6 On April 11, 2008, Monte Vista Water District filed its *Response to Watermaster's*
7 *Compliance with Conditions Subsequent Numbers Three and Four, etc.* On April 16, 2008, the
8 Special Referee filed her *Comments of Special Referee on Watermaster Compliance with December*
9 *21, 2007 Order Conditions 1 through 4.* The Special Referee finds no fault with Watermaster's filing
10 regarding Condition 1. Although Watermaster has made timely and responsive filings regarding
11 Conditions 2 and 3, the Special Referee suggests that the filings may not be approved until
12 Watermaster files a motion requesting such relief. As for Condition Number 4, the Special Referee
13 recommends that Watermaster be required to make further showings in the future. The following is
14 Watermaster's Response to these filings.

15 **II. SPECIAL REFEREE COMMENTS REGARDING CONDITIONS SUBSEQUENT**
16 **TWO AND THREE**

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18 The Special Referee concludes that Watermaster has made timely filings with respect to each
19 of Conditions 2 and 3. The Special Referee also finds that the filings satisfy the substantive
20 elements of the Court's request: " . . . the court should approve those submittals as responsive to
21 those Conditions Subsequent" (Special Referee Comments 8:17.)¹ However, the Special
22 Referee does not recommend that the Court approve Conditions Two and Three, because of a
23 procedural difference of opinion as to whether Watermaster should have proceeded by filing a new
24 motion requesting approval of the filing. " . . . Watermaster has not yet filed its motion for court

25 _____
26 ¹ The Special Referee correctly notes that Table 3-5c from the Wildermuth Condition Number 3
27 Report is inconsistent with the table submitted by Watermaster in response to Condition Number
28 Two. The Referee requests clarification regarding this discrepancy. The table submitted with the
Wildermuth Report is incorrect. Corrected Table 3-5c is attached to this pleading as Exhibit A.
The corrected Table 3-5c is identical to the table submitted to the Court in satisfaction of Condition
Number 2.

1 approval of the documents it submitted in response to Conditions Subsequent 2 and 3.ö (Special
2 Referee Comments 2:28-3:1.)

3 Watermasterø rationale for not proceeding by new motion has its genesis in the December
4 21, 2007 Order of the Court and the characterization of the follow-up filings as conditions
5 subsequent to the Courtø approval of the *initial motion*. Watermaster understood that its submittals
6 to the requirements were within the context of the original Motion and the conditions do not
7 expressly require the filing of a separate motion unless the Peace II instruments and the expectations
8 of the Parties contemplate it. In relevant part, the December 21 Order provides:

9
10 2. By February 1 2008, Watermaster shall *prepare and submit* to
11 the Court for approval a corrected initial schedule to replace
12 Resolution No. 07-05 Attachment öEö, together with an explanation of
13 the corrections made.

14 3. By March 1, 2008, Watermaster shall *prepare and submit* to
15 the Court for approval a new Hydraulic Control technical report that
16 shall address all factors included in the Special Refereeø Final Report
17 and Recommendations. The new Hydraulic Control report shall
18 include technical analysis of the projected decline in safe yield, and a
19 definition and analysis of önew equilibriumö issues. (December 21,
20 2007 Order Concerning Motion for Approval of Peace II Documents a
21 p. 8, emphasis added.)

22 The very nature of these submittals was more ministerial in character. No Partiesø individual
23 rights or obligations were expanded or contracted by the filings. No Parties gained new rights or
24 remedies by clarifying a discrepancy between the initial schedule that was transmitted to the Court
25 prior to the completion of the Wildermuth Final Report and therefore obsolete and the one that was
26 subject to Watermasterø closing briefing. The same can be said of Mr. Wildermuthø independent
27 expert report to the Court as requested in fulfillment of Condition Three. Consequently, Watermaster
28 believed it was proceeding under the earlier order and that no önew reliefö was being requested.
(See Declaration of Michael T. Fife, ¶ 3, attached to this pleading as Exhibit öB.ö) That is, the very
nature of a condition subsequent relates to the earlier Motion for Court approval.

Watermasterø filing with respect to Condition Two explicitly referenced the Courtø Order
directing that Condition Two was to be submitted for approval. (Watermasterø January 31, 2008

1 Filing 3:9-11.) Moreover, Watermaster specifically requested Court approval of the Wildermuth
2 report in its submittal. (Watermaster respectfully requests that the Court approve this report.)
3 Watermaster's March 3, 2008 Filing 1:21-22.)

4 Watermaster's method of proceeding also appeared proper given that a hearing date had been
5 scheduled for May 1, 2008 for the express purpose of reviewing and approving the submittals. The
6 act of scheduling a motion for the purpose of having its submittals approved seemed redundant and
7 unnecessary.

8 Similarly, Monte Vista Water District's *Response to Watermaster's Compliance with*
9 *Conditions Subsequent* and its *Request for Additional Time* were not made by noticed motion,
10 but were rather framed within the context of Watermaster's October 27, 2008 Motion. With the vast
11 service and the open character of the Watermaster process, no person can fairly claim surprise or
12 prejudice by the absence of the word "motion" from the pleading caption.

13 Nevertheless, if the Court prefers that Watermaster proceed by new motion, Watermaster
14 respectfully requests the Court to deem its timely and responsive submittals as motions. There is no
15 prejudice to the Court or any of the parties. All of the reports were timely filed, there is a hearing
16 date on calendar, all of the parties received notice and at least one party has filed a responsive
17 pleading. (See Declaration of Michael T. Fife, ¶ 4, attached to this pleading as Exhibit "B.") No
18 party has raised any procedural objection concerning the identification of the requests for approval
19 as "responses" rather than "motions." (*See Generally Fundin v. Chicago Pneumatic Tool Co.*, 152
20 Cal. App. 3d 951, 955 (1984).)

21 **III. SPECIAL REFEREE'S COMMENTS REGARDING CONDITION SUBSEQUENT**
22 **NUMBER FOUR**

23
24 Condition subsequent number four provides:

25 By April 1, 2008, Watermaster shall report of the Court on the status
26 of CEQA documentation, compliance, and requirements, and provide
27 the Court with assurances that Watermaster's approval and
28 participation in any project that is a "project" for CEQA purposes has
been or will be subject to all appropriate CEQA review.

1 (December 21, 2007 Order Concerning Motion for Approval of Peace II Documents a p. 8.)

2 In compliance, Watermaster reported on the status of CEQA documentation for projects to
3 date. The report included determinations made by the lead agencies under CEQA ó Western
4 Municipal Water District and Inland Empire Utilities Agency. The Special Referee opines that,
5 öWatermasterø Response to Condition Subsequent 4 does not provide assurances to the court that
6 Watermasterø approval and participation in the Peace II project will be subject to all appropriate
7 CEQA review.ö (Special Referee Comments 7:14-16.)

8 The Special Referee acknowledges that Watermaster reported that CEQA review is
9 underway and partially completed for the entire desalter expansion including increased groundwater
10 pumping for the desalters. (Special Referee Comments 6:19-7:9.) The Special Referee also
11 acknowledges that CEQA review has been initiated for öfurther itemsö relating to Peace II, including
12 Basin Re-Operation and Hydraulic Control and that sufficient funds have been budgeted for this
13 purpose, but calls in to question öwhat these further items are.ö (Special Referee Comments 7:10-
14 13.)

15 It bears pointing out that Watermaster itself is not conducting CEQA review. As an arm of
16 this Court, functioning as a special master, it leaves the decisions regarding CEQA compliance to the
17 parties to the Judgment that are subject to CEQA. No person has suggested that IEUA or Western is
18 not properly designated as öLead Agencyö within the meaning of CEQA. No party to the Judgment
19 or member of the public has contested the timing or the adequacy of any aspect of the CEQA process
20 related to the implementation of the Peace II Measures. Accordingly, there is no claim or any
21 evidence that CEQA has not or will not be satisfied.

22 Watermaster does have a standard against which it may evaluate claims of CEQA
23 compliance or non-compliance. The full scope of the Peace II measures is described in the öProject
24 Descriptionö which is attachment öAö to Watermaster Resolution 07-05 which is attached to the
25 Peace II Agreement as Exhibit ö1.ö Attachment öAö provides that the Project Description set forth
26 therein will be used in, öany environmental impact report to be prepared as part of the expansion of
27 the desalters.ö (Project Description for the 2007 Amendment to the Chino Basin Optimum Basin
28 Management Program at p. 1.) The Special Refereeø Report overlooks the fact that the öProject

1 Description for the Project that is the subject Condition Number Four has already been written,
2 and that under the Peace II Agreement this is the Project Description that is to be used for the
3 appropriate CEQA review. Accordingly, under the Court's December 21, 2007 Order, Watermaster
4 must assure that in any appropriate CEQA review, this is the Project Description that will be used at
5 least insofar as Watermaster has review or approval authority.

6 The Special Referee recommends that, "The court should require Watermaster to report back
7 . . . to further explain action to be taken in compliance with CEQA for the entire desalter expansion,
8 increased groundwater pumping for the desalters, hydraulic control and basin reoperation activities,
9 and the overall changes that are to proceed under the auspices of the Peace II order." (Special
10 Referee Comments 7:16-20.) Watermaster has no objection to keeping the Court apprised of the
11 procedural processing and analysis, either through a report on CEQA compliance or referenced and
12 encompassed within other Watermaster filings.

13 However, the Special Referee additionally recommends that, "Watermaster should return to
14 the court with a full description of what its analysis of further items relating to Peace II, including
15 Basin Re-Operation and Hydraulic Control means, including submitting to the court for its review
16 the scope of work now being proposed. Watermaster should also provide to the court a full
17 discussion of what it views as the project and whether and on what basis it concurs with the WEI
18 Final Response Report with respect to definition of the project to be analyzed for CEQA purposes,
19 and the baseline to be used in CEQA analysis." (Special Referee Comments 8:8-14.) Watermaster
20 respectfully disagrees.

21 Although Watermaster is not a party to the Peace II Agreement, by Resolution and by order
22 of this Court, Watermaster is bound to follow the project definition set forth in the Peace II
23 Measures. It has no right to expand, contract or to modify what it has previously pledged to respect
24 and use. Watermaster itself offered the WEI Final Response Report in satisfaction of its obligations
25 under the Court's Order. It can hardly disavow its contents. There is little mystery as to views of
26 Watermaster.

27 Watermaster easily spent more than a million dollars in technical analysis and modeling of
28 potential adverse impacts that may be attributable to the Peace II measures. It subjected its work to

1 review by the assistant to the Special Referee, all independent of CEQA, for the purpose of
2 providing assurances to the parties, to the Court and to the public generally that adverse impacts
3 were insignificant or avoided. Thus, in many ways, Watermaster has already completed a technical
4 review of impacts similar or the functional equivalent of CEQA.

5 Another reason this extensive review and analysis was undertaken by Watermaster was for
6 the very purpose of providing the Court with a reservoir of information and analysis regardless of
7 what was forthcoming from CEQA. As this Court is aware, Watermaster is not the entity
8 responsible for conducting CEQA review.

9 Under CEQA, the "lead agency" is "the public agency which has the principal responsibility
10 for carrying out or approving [a] project which may have a significant effect upon the environment."
11 (Cal. Pub. Res. Code § 21067.) Historically, Watermaster has not expressed advisory opinions on
12 which agency should be "lead agency" or expressed opinions on the adequacy of environmental
13 review. The lead agency determination is set forth in the CEQA Guidelines. (CEQA Guidelines §§
14 15051, 15052.) "Each public agency must meet its own responsibility under CEQA and shall not
15 rely on comments from other public agencies or private citizens as a substitute for work." A Lead
16 Agency is responsible for the adequacy of its environmental documents. (CEQA Guidelines §§
17 15020.)

18 Watermaster has accepted the determinations of each lead agency, subject to the rights of any
19 member of the public or party to the Judgment to challenge the determinations within the applicable
20 statute of limitations. Where there is no comment or challenge and when the statute of limitations
21 have run, there is no case of controversy before Watermaster regarding CEQA and substantial
22 evidence supports a finding of CEQA compliance.

23 For the purpose of CEQA review, Watermaster views the "Project" as what is described in
24 the "Project Description." The Project Description describes Basin Re-Operation, Hydraulic Control,
25 and further items such as expanded desalter capacity. Watermaster has assured that CEQA review
26 has been or will be subject to all appropriate CEQA review. As reported previously, this review is
27 underway and Watermaster is further assisting this process by providing sufficient funding.

1 If this Court wishes Watermaster to dictate to the lead agency *how* it should conduct its
2 CEQA review, Watermaster will of course comply. However, we respectfully submit that requiring
3 Watermaster to act in this way, rather than report the actions of others, may have consequences
4 beyond the Peace II measures and may establish precedent for virtually any project that intersects
5 with Watermaster's review and regulation.

6 **IV. MONTE VISTA WATER DISTRICT'S RESPONSE**

7 On April 11, 2008, Monte Vista Water District filed its *Response to Watermaster's*
8 *Compliance with Conditions Subsequent Numbers Three and Four of the Court's 12/21/2007 Order;*
9 *Request for Additional Time to Evaluate Watermaster's Compliance with Condition Subsequent*
10 *Number Three; and Withdrawal of Monte Vista Water District's Joinder to Watermaster's Motion*
11 *for Approval of Peace II Documents.*

12 On April 24, 2008, the Watermaster Advisory Committee and Board voted unanimously to
13 adopt a stipulation with Monte Vista Water District that responds to Monte Vista's concerns. The
14 Monte Vista Water District Board voted to approve the stipulation at its regularly scheduled meeting
15 of April 23, 2008. Pursuant to the terms of the stipulation, Monte Vista shall withdraw its Response.

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17
18 Dated: April _____, 2008

BROWNSTEIN HYATT FARBER SCHRECK, LLP

19
20 By: _____

21 Scott S. Slater
22 Michael T. Fife
23 Amy M. Steinfeld
24 Attorneys for Chino Basin Watermaster
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