

1 Allen W. Hubsch (Bar No. 136834)
HOGAN & HARTSON L.L.P.
2 1999 Avenue of the Stars, 15th Floor
Los Angeles, California 90067
3 Telephone: (310) 785-4600
Facsimile: (310) 785-4601
4

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6 Attorneys for Non-Agricultural (Overlying) Pool
Committee
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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9
10 COUNTY OF SAN BERNARDINO

11 CHINO BASIN MUNICIPAL WATER
12 DISTRICT,

13 Plaintiff,

14 v.

15 CITY OF CHINO, ET AL.,

16 Defendants.
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Case No. RCVRS 51010

Judgment Entered On January 27, 1978, as
Amended

**NOTICE OF MOTION AND MOTION
BY NON-AGRICULTURAL
(OVERLYING) POOL COMMITTEE
FOR COURT REVIEW OF
WATERMASTER ACTIONS
PURSUANT TO SECTION 31 OF
JUDGMENT; MEMORANDUM IN
SUPPORT THEREOF**

Filed concurrently herewith:

- 1) Declaration of Robert W. Bowcock
- 2) Declarations Kevin D. Sage, David L.
Penrice, Curtis Stubbings, Robert W.
Lawhn, Steven R. Arbelbide, Brian
Geye, David Starnes and Mark Ward
- 3) Request for Judicial Notice
- 4) Proposed Order
- 5) Declaration of Allen W. Hubsch
Regarding Service

Date: April 16, 2010
Time: 10:30 a.m.
Dept.: Dept. C-1
Chino, California

Assigned for All Purposes to the
Honorable STANFORD E. REICHERT

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1 TO EACH PARTY TO THIS ACTION AND TO THE COUNSEL OF RECORD FOR
2 EACH PARTY:

3 YOU ARE HEREBY NOTIFIED THAT on March __, 2010 at __ a.m., in Department C-
4 1 of this Court located at 13260 Central Avenue, Chino, California 91710, the Non-Agricultural
5 (Overlying) Pool Committee will and hereby does move, pursuant to § 31 of the Judgment
6 previously entered in this Case, for a declaration (a) that Watermaster on behalf of the
7 Appropriative Pool did not deliver to the members of the Non-Agricultural Pool a Notice of Intent
8 to Purchase in the manner and within the time required by that certain Purchase and Sale
9 Agreement for the Purchase of Water by Watermaster from Overlying (Non-Agricultural) Pool
10 dated September 27, 2007 and (b) all of the water subject thereto should be restored to the
11 accounts of the members of the Non-Agricultural (Overlying) Pool.

12 The Motion will be based upon this notice, the attached memorandum in support, the
13 declarations attached hereto, the pleadings, records and files herein, and on such oral argument as
14 may be presented at the hearing on the Motion.

15 Date: March **16** 2010

HOGAN & HARTSON LLP

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18 By: 

19 Allen W. Hubsch
20 Attorneys for the Non-Agricultural
(Overlying) Pool Committee
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 In 2007, the Non-Agricultural Pool of the Chino Basin Watermaster (the "Non-Ag Pool")
4 granted to Watermaster, for the benefit of the Appropriative Pool, a valuable option to purchase
5 certain water owned by the Non-Ag Pool. The Non-Ag Pool makes this motion to prevent the
6 Appropriative Pool from using its influence within the Watermaster system to seize that water,
7 notwithstanding the failure by the Appropriative Pool to properly exercise the option.

8 II. FACTUAL BACKGROUND

9 A. The Pools

10 The original Judgment in this Action arose from disputes among three competing parties
11 or "pools", of water users. The Judgment recognized the existence of these three competing
12 groups, and formalized them as the Appropriative Pool, the Agricultural Pool and the Non-Ag
13 Pool. These three pools continue to have distinct and, in some cases, conflicting interests.
14 Bowcock Decl. ¶5. Until about November 2008, a Special Referee appointed by the Court
15 actively supervised the Watermaster Board and staff, and made reports and recommendations to
16 the Court regarding Watermaster activities. Bowcock Decl. ¶5.

17 The Non-Ag is by far the smallest of the three pools established by the Judgment. The
18 Non-Ag Pool has only 1 member on the 9-member Watermaster Board. Bowcock Decl. ¶6,
19 Exhibit A. The Non-Ag Pool has only 3 members on the 39-member Advisory Committee.
20 Bowcock Decl. ¶6, Exhibit B. For the 2008-2009 Watermaster fiscal year, the Non-Ag Pool
21 produced only about 4% of the overall volume of water. Bowcock Decl., Exhibit C. For the
22 2009-2010 fiscal year, the Non-Ag Pool was budgeted about 2% of financial assessments.
23 Bowcock Decl., Exhibit D.

24 In addition to the Non-Ag Pool, the other small pool within the 3-pool Watermaster
25 system is the Agricultural Pool. The Agricultural Pool has 2 members on the 9-member
26 Watermaster Board, and 7 members on the 39-member Advisory Committee. Bowcock Decl. ¶7,
27 Exhibits A & B. The Agricultural Pool produced 26% of the overall volume of water in the most
28 recent year. Bowcock Decl., Exhibit C.

1 The Appropriative Pool is by far the largest of the three pools established by the
2 Judgment, and it effectively controls the Watermaster system. Entities that are members of the
3 Appropriative Pool hold 4 positions on the Watermaster Board. Bowcock Decl. ¶8, Exhibit A.
4 The Appropriative Pool has 26 members on the 39-member Advisory Committee. Bowcock
5 Decl., Exhibit B. For the most recent year, the Appropriative Pool produced about 70% of the
6 overall volume of water. Bowcock Decl., Exhibit C. As a result of an agreement entered into
7 between the Appropriative Pool and the Agricultural Pool to settle various disputes between
8 them, the Appropriative Pool currently pays all of the Agricultural Pool's financial assessments.
9 Id. For the 2009-2010 fiscal year, the Appropriative Pool was budgeted about 98% of the
10 financial assessments in the most recent year. Bowcock Decl., Exhibit D. In this system, the
11 Appropriative Pool dominates the financial affairs of Watermaster, and Watermaster staff and
12 counsel act accordingly.¹ During the period that the Special Referee was active in this case, the
13 Special Referee acted as a check on the dominance of the Appropriative Pool.

14 B. **The Peace II Agreement**

15 By Order entered on December 21, 2007, this Court authorized Watermaster to proceed in
16 accordance with the so-called "Peace II Agreement". Request For Judicial Notice, ¶2. The Peace
17 II Agreement includes as an attachment a Purchase and Sale Agreement For the Purchase of
18 Water by Watermaster from Overlying (Non-Agricultural) Pool dated September 27, 2007 (the
19 "Peace II Option Agreement"). Bowcock Decl. ¶10, Exhibit E.

20 Pursuant to Section C of the Peace II Option Agreement, the members of the Non-Ag Pool
21 granted to Watermaster for the benefit of the Appropriative Pool an option to purchase water (the
22 "Non-Ag Storage Water") that the Non-Ag Pool members held in storage on June 30, 2007 (the
23 "Peace II Option"). The Appropriative Pool was entitled to exercise the option as follows:

24 C. **Notice.** Within twenty-four months of the final Court approval of this

25 ¹ Consistent with the financial dominance of the Appropriative Pool, Watermaster staff and
26 counsel, rather than acting as neutrals in this matter, have actively advocated on behalf of the
27 Appropriative Pool, and against the Non-Ag Pool. The Watermaster CEO and Watermaster
28 counsel have participated in several closed-door meetings with members of the Appropriative
Pool to discuss this matter, meetings from which members of the Non-Ag Pool have been barred.
Sage Decl. ¶5. Because of the bias exhibited by Watermaster staff and counsel, the Non-Ag Pool
has no recourse other than to this Court. Bowcock Decl. ¶9.

1 Agreement ("Effective Date"), and only with the prior approval of the Appropriative
2 Pool, Watermaster will provide written **Notice of Intent to Purchase** the Non-
3 Agricultural (Overlying) Pool water pursuant to § 5.3(a) of the Peace Agreement, which
4 therein identifies whether such payment will be in connection with Desalter
5 Replenishment or a Storage and Recovery Program. (emphasis in original).

6 Bowcock Decl. ¶11, Exhibit E at § C. Section C makes clear that the written Notice of Intent to
7 Purchase was required to (a) be delivered no later than December 21, 2009 (the 2nd anniversary of
8 approval of the Peace II Agreement); and (b) specifically identify the intended use of the Non-Ag
9 Storage Water, which had to be either Desalter Replenishment or a Storage and Recovery
10 Program.

11 C. **The Favorable Option Price**

12 The Peace II Option had, on the date granted, considerable value to the Appropriative
13 Pool. The option price was approximately \$215 per acre foot, payable in four annual
14 installments. Bowcock Decl. ¶12, Exhibit E at § D. The option price represented an approximate
15 8% discount from the Metropolitan Water District Replenishment Rate (the "MWD
16 Replenishment Rate") then in effect. Bowcock Decl. ¶12, Exhibit F. If the Appropriative Pool
17 had exercised the Peace II Option on December 22, 2007 (the day after it became effective), the
18 Appropriative Pool could have realized an immediate benefit of approximately \$700,000 -
19 \$800,000. Bowcock Decl. ¶12, Exhibit F.

20 The Peace II Option became even more valuable to the Appropriative Pool in subsequent
21 years. The MWD Replenishment Rate increased to \$258 per acre foot on January 1, 2008, to
22 \$294 per acre foot on January 1, 2009, and to \$366 per acre-foot on September 1, 2009.
23 Bowcock Decl. ¶13, Exhibit F. By September 1, 2009, the fixed option price for the Non-Ag
24 Storage Water represented a 41% discount from the MWD Replenishment Rate. Bowcock Decl.
25 ¶13. If the Appropriative Pool had exercised the Peace II Option on September 1, 2009, the
26 Appropriative Pool could have realized a benefit of approximately \$5,800,000. Bowcock Decl.
27 ¶13.

28 D. **The Appropriative Pool's Decision to Pursue a Windfall**

Rather than accept this substantial built-in profit, the Appropriative Pool began in 2008 to

1 pursue a complicated strategy to generate an even bigger windfall. The Appropriative Pool
2 proposed to conduct an auction, which targeted outside investors, including investment funds
3 headquartered in Colorado, Texas and New York City, to purchase the Non-Ag Storage Water.
4 Bowcock Decl. ¶14. Rather than use the Non-Ag Storage Water for Desalter Replenishment or a
5 Storage and Recovery Program within the Basin, as required by the Peace II Option Agreement,
6 the Appropriative Pool proposed to make the water available to speculative investors who would
7 pay even more than the MWD Replenishment Rate. Bowcock Decl. ¶14. The Appropriative Pool
8 claimed that this export was part of a "Storage and Recovery Program", even though the water
9 might be physically transported outside the Chino Basin for consumptive use elsewhere.
10 Bowcock Decl. ¶14. Watermaster established a minimum bid of \$600 per acre-foot for the
11 auction. Bowcock Decl. ¶14, Exhibit G. Watermaster CEO Ken Manning publicly stated that he
12 expected to receive bids up to \$1,000 per acre-foot, representing a potential profit to the
13 Appropriative Pool of approximately \$30,000,000. Bowcock Decl. ¶14, Exhibit G. The
14 Appropriative Pool intended to use a portion of this huge windfall to pay the option price under the
15 Peace II Option Agreement. Bowcock Decl. ¶14, Exhibit I at § II.A. The auction was scheduled
16 to occur on November 4, 2009. Bowcock Decl. ¶14, Exhibit G.

17 E. The August 2009 "Form of Notice"

18 In anticipation of this auction process, Watermaster staff took some preliminary actions
19 relating to the Peace II Option Agreement. On August 13, 2009, at a meeting of the
20 Appropriative Pool, Watermaster staff presented to the Appropriative Pool a document that was
21 specifically described in the accompanying staff report as a "form of the Notice". Bowcock Decl.
22 ¶15, Exhibit H. The Watermaster CEO stated that "as part of the Peace II Agreement in the
23 purchase of the Overlying Non-Agricultural water one of the requirements was to issue an official
24 notice of intent to Purchase." Bowcock Decl. ¶15, Exhibit I at § II.A. (emphasis added). At the
25 same meeting, according to the official minutes, Watermaster counsel Michael Fife stated:

26 Staff has proposed to put the purchase date out as far as possible and still be in
27 compliance with the Purchase and Sale Agreement due to not knowing the exact date of
28 the auction; the proposed date is December 18, 2009. Counsel Fife stated that the
primary issue is that the notice has to identify how the water will be used.

1 Bowcock Decl. ¶15, Exhibit I at § II.A (emphasis added). At this meeting, according to the
2 official minutes, the Appropriative Pool voted to use 2,652 acre-feet of the Non-Ag Storage
3 Water for Desalter Replenishment and 36,000 acre feet for the "auction process". Bowcock
4 Decl. ¶15, Exhibit I at § II.A.

5 Two weeks later, at the August 27, 2009 meeting of the Watermaster Board, Watermaster
6 staff presented a "form of notice" to the Watermaster Board. The Watermaster staff report again
7 specifically described the document as a "form of the Notice". Bowcock Decl. ¶16, Exhibit J. In
8 addition, Watermaster CEO reminded the Board (dominated by members of the Appropriative
9 Pool) of the deadline to deliver the written Notice of Intent to Purchase:

10 Mr. Manning stated one of the provisions of the Peace II Agreement is to provide a
11 Notice of Intent to Purchase regarding the purchase of the 38,652 acre-feet of water
12 from the Non-Agricultural Pool which needs to be approved prior to the actual purchase.
13 The Notice of Intent to Purchase must be filed by December 21, 2009; the notice is
dated December 18, 2009 which will allow enough time to get the process started.

14 Bowcock Decl. ¶16, Exhibit K at § II.A. The official minutes further disclose that, at the August
15 27 Board meeting, there was substantial discussion about the proposed use of the water. The
16 minutes reflect that, in the end, the intended use of the Non-Ag Storage Water was actually
17 rejected by the Watermaster Board. The official minutes state that the Board "refer[red] the 2,652
18 acre-feet back to the Appropriative Pool for further consideration and a separate motion".
19 Bowcock Decl. ¶16, Exhibit K at § II.A (emphasis added). Because the Peace II Option
20 Agreement mandated that the intended use of the Non-Ag Storage Water be stated in the written
21 Notice of Intent to Purchase, the Board's rejection of the intended use was a rejection of the
22 "form of notice".

23 At the meeting of the Appropriative Pool on October 1, 2009, the Appropriative Pool
24 considered the proposed uses sent back by the Watermaster Board. Bowcock Decl. ¶17, Exhibit
25 L. According to the official minutes of that meeting, there was disagreement among members of
26 the Appropriative Pool about how some of the Non-Ag Storage Water should be used. Bowcock
27 Decl. ¶17, Exhibit M at § II.A. Watermaster staff recommended that the water in question be
28 used for Desalter Replenishment. Bowcock Decl. ¶17, Exhibits L & M. The Fontana Water

1 Company wanted to use the water for a different purpose. Bowcock Decl. ¶17, Exhibits L & M.
2 According to the official minutes of that meeting, the Appropriative Pool voted to "table the item
3 for 30 days for further discussion and possible Watermaster staff recommendations": Bowcock
4 Decl. ¶17, Exhibit M at § II.A.

5 F. Written Acknowledgements That Notice Was Not Given

6 At the next meeting of the Appropriative Pool, on November 5, 2009, Watermaster staff
7 submitted a report to the Appropriative Pool reminding the Appropriative Pool of the need to
8 deliver the written Notice of Intent to Purchase. The staff report read, in relevant part, as follows:

9 Under the Purchase and Sale Agreement, Watermaster, at the direction of the
10 Appropriative Pool, is to issue a Notice of Intent to Purchase to the Non-Agricultural
11 Pool within 24 months after Court approval of the Peace II Documents. Thus the Notice
of Intent to Purchase must be issued by December 21, 2009.

12 Bowcock Decl. ¶18, Exhibit N at p. 1. The staff report then went on to make a single critical
13 recommendation:

14 Staff recommends that the Appropriative Pool direct Watermaster to issue the Notice of
15 Intent to Purchase prior to December 21, 2009 and place the water purchased in storage
pursuant to the proposed Plan.

16 Bowcock Decl. ¶18, Exhibit N at p. 2.

17 However, at the same November 5, 2009 meeting, Watermaster staff announced to the
18 Appropriative Pool that the auction, scheduled for November 4, had been postponed indefinitely
19 due to concerns by potential bidders about so-called "recovery issues". Bowcock Decl. ¶19,
20 Exhibit O at § VII.1 & Exhibit P. In response to the postponement of the auction, the
21 Appropriative Pool considered a so-called "Plan B". Bowcock Decl. ¶19, Exhibit O at § VII.1.
22 Plan B was described in bullet-point form on a single page, and provided as follows:

23 (1) By December 21, 2009, Watermaster, under the direction of the
24 Appropriative Pool, will send the Notice of Intent to Purchase pursuant to the Purchase
and Sale Agreement.

25 ...

26 (4) Watermaster shall hold the Purchased Water Account in trust for the
27 members of the Appropriative Pool, and shall allocate the water held in the Purchased
Water Account according to direction from the Appropriative Pool.

28 ...

(8) If the water in the Purchased Water Account has not been utilized in a Storage and Recovery Program or Desalter Replenishment within 3 years from the date it is placed into the storage account, then the Appropriative Pool may elect to distribute the water according to the same formula used to allocate the cost of purchasing the water from the Non-Agricultural Pool.

Bowcock Decl. ¶19, Exhibit N at final page. According to the official meeting minutes of the Appropriative Pool, Plan B was approved by the Appropriative Pool on November 5, 2009. Bowcock Decl. ¶19, Exhibit O at § VII.1.

At the November 19, 2009 meeting of the Advisory Committee, and again at the November 19, 2009 meeting of the Watermaster Board, later that the same day, Watermaster staff again reminded the Board and the Pools that the written Notice of Intent to Purchase was still outstanding. On that date, staff submitted to both the Advisory Committee and the Watermaster Board a revised version of Plan B for the Advisory Committee's and the Board's information.² Bowcock Decl. ¶20, Exhibit Q at § II.A.2. The revised Plan B, in the form included in both agenda packages, stated that:

By December 21, 2009, Watermaster, under the direction of the Appropriative Pool, will send the Notice of Intent to Purchase pursuant to the Purchase and Sale Agreement.

Bowcock Decl. ¶20, Exhibit Q at § II.A.2 & final page. By November 19, 2009, Watermaster counsel and staff had publicly acknowledged, and reminded the Watermaster Board multiple times, that delivery of the written Notice of Intent to Purchase had not yet occurred.

G. Verbal Confirmation That Notice Not Given

In addition to the foregoing, during meetings of the Appropriative Pool during the summer and fall of 2009, Watermaster counsel Michael Fife and the current chair of the Appropriative Pool, Mark Kinsey, stated publicly that the written Notice of Intent to Purchase would be given to the Non-Ag Pool on the last possible date. Bowcock Decl. ¶21; Sage Decl. ¶4. The last possible date was December 21, 2009.

² Because Plan B was provided by Watermaster staff solely as a report, neither the Advisory Committee nor the Watermaster Board ever approved Plan B. Bowcock Decl. ¶ 20.

1 **H. Watermaster Staff Initially Has No Answer**

2 On January 7, 2010, during a public meeting of the Appropriative Pool at which
3 Watermaster staff was present, David Penrice, a member of the Non-Ag Pool asked Watermaster
4 staff whether and when the written Notice of Intent to Purchase had been provided. Penrice
5 Decl. ¶5; Bowcock Decl. ¶22. Following the question, Watermaster CEO Ken Manning and
6 Watermaster counsel Michael Fife looked at each other, then conferred privately with one
7 another for an extended period of time, and then the Watermaster CEO stated "We will have to
8 get back to you". Penrice Decl. ¶5; Bowcock Decl. ¶22. Clearly, the Watermaster CEO and
9 Watermaster counsel did not know when the written Notice of Intent to Purchase had been
10 delivered, because it had not been delivered at all.

11 **I. Watermaster Staff Re-Writes History**

12 After the meeting, Watermaster counsel Michael Fife gave pages of the agenda package
13 from the August 27 meeting of the Watermaster Board to Mr. Penrice, and claimed that the
14 agenda package constituted the notice he had asked about. Penrice Decl. ¶6. Thereafter, the
15 Chair of the Non-Ag Pool Committee, Bob Bowcock, called a special meeting of the Non-Ag
16 Pool Committee on January 18, 2010, and asked Watermaster staff and counsel to explain the
17 circumstances relating to the written Notice of Intent to Purchase. Bowcock Decl. ¶23. During
18 that meeting, Watermaster counsel Michael Fife again claimed that the agenda package from the
19 August 27 meeting of the Watermaster Board constituted notice, and that the existence of such
20 agenda package was disclosed by an August 21 e-mail announcing the August 27 meeting of the
21 Watermaster Board. Bowcock Decl. ¶23 & Exhibit R at pp. 4 & 8; Penrice Decl. ¶7. The
22 Watermaster CEO and Watermaster counsel also claimed that the written Notice of Intent to
23 Purchase was unnecessary because there was "no indication at any time that this option was not
24 to be exercised". Bowcock Decl. ¶23 & Exhibit R at p. 4; Penrice Decl. ¶7. In addition,
25 Watermaster counsel Michael Fife stated that: "Watermaster's books have been changed. The
26 38,000 and change acre-feet of water have been moved out of the Non-Agricultural Pool's
27 storage accounts." Bowcock Decl. ¶23 & Exhibit R at p. 11; Penrice Decl. ¶7.

1 J. Watermaster Staff Tenders Checks in January 2010

2 Section D of the Peace II Option Agreement required the Appropriative Pool to pay the
3 first installment of the option price for the Non-Ag Storage Water within 30 calendar days after
4 the Notice of Intent to Purchase was given. Bowcock Decl. ¶24, Exhibit E at § D. In fact, the
5 Appropriative Pool did not tender the first installment of the option price to the members of the
6 Non-Ag Pool until mid-January 2010. Bowcock Decl. ¶24; Penrice Decl. ¶8. Tender of checks
7 in mid-January implies that the written Notice of Intent to Purchase was delivered sometime after
8 mid-December.

9 K. Consequence If the Written Notice Was Not Given

10 Section H of the Peace II Option Agreement contains a secondary option in favor of the
11 Appropriative Pool that governs if the Appropriative Pool does not deliver the written Notice of
12 Intent to Purchase by December 21, 2009. Bowcock Decl. ¶25 & Exhibit E at § H. The
13 secondary option provides that if the Appropriative Pool does not exercise the Peace II Option,
14 then the Non-Ag Storage Water will be made available for purchase by the Appropriative Pool at
15 92% of the current MWD Replenishment Rate. Bowcock Decl. ¶25.

16 Watermaster counsel Michael Fife informed this Court, in a brief submitted for a hearing
17 on May 1, 2008, that:

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

23 Request for Judicial Notice, ¶3.³

24 As stated above, the current MWD Replenishment Rate is \$366 per acre-foot, of which
25 92% is \$336.72 per acre-foot. Bowcock Decl. ¶13. If the secondary option becomes operative,
26

27 ³ Neither the Appropriative Pool nor the Watermaster staff have ever requested an extension of
28 the December 21, 2009 deadline for delivery of the written Notice of Intent to Purchase, and
Watermaster staff and counsel have expressly denied that any neglect, mistake or inadvertence
occurred. Bowcock Decl. ¶ 27, Exhibit R at p. 13.

1 then the Non-Ag Pool would receive an incremental benefit of about \$112 per acre-foot.
2 Bowcock Decl. ¶25. If the Appropriative Pool pursues the auction successfully and realizes
3 prices up to \$1,000 per acre-foot, as publicly claimed by the Watermaster CEO (Bowcock Decl.
4 ¶14), then the Appropriative Pool could still realize a huge windfall of about \$663 per acre-foot,
5 or about \$25,500,000 in the aggregate. Bowcock Decl. ¶25.

6 **III. THE OPTION WAS NOT EXERCISED**

7 The written Notice of Intent required by the Peace II Option Agreement was not given,
8 and the Non-Ag Storage Water remains the property of the members of the Non-Ag Pool.

9 **A. No Written Notice Was Received.**

10 As demonstrated by the attached declarations of the members of the Non-Ag Pool, none of
11 them received a written Notice of Intent to Purchase. Bowcock Decl. ¶26; Penrice Decl. ¶4;
12 Stubbings Decl. ¶3; Arbelbide Decl. ¶3; Geye Decl. ¶3.; Lawhn Decl. ¶3; Starnes Decl. ¶3; Ward
13 Decl. ¶3.

14 **B. The Claim That Notice Was Unnecessary Is Untrue.**

15 The claim that written Notice of Intent to Purchase was unnecessary because there was
16 “no indication at any time that this option was not to be exercised” is untrue and misses the point.
17 Those members of the Non-Ag Pool who were relatively knowledgeable knew, among other
18 things, that the Watermaster Board (dominated by members of the Appropriative Pool) had, at the
19 August 27 Watermaster Board meeting, rejected the proposed uses of the Non-Ag Storage Water
20 approved by the Appropriative Pool Committee on August 13, and that the Appropriative Pool
21 had thereafter tabled the “form of notice” in October 2009, despite being reminded by
22 Watermaster staff that the written Notice of Intent to Purchase had not yet been given. Bowcock
23 Decl. ¶¶15, 16, 17. Those members also knew that the Appropriative Pool (but not the Board)
24 had approved Plan B. Bowcock Decl. ¶¶19, 20, 21; Sage Decl. ¶4. Those members also knew
25 that when the auction failed in November 2009, the Appropriative Pool’s original source of
26 funding for the option price evaporated, creating more uncertainty about the Appropriative Pool’s
27 willingness and ability to purchase the Non-Ag Storage Water. Moreover, the members of the
28 Non-Ag Pool were routinely asked to leave public meetings of the Appropriative Pool at which

1 the members of the Appropriative Pool discussed the Peace II Option Agreement and the auction
2 of the Non-Ag Storage Water. Bowcock Decl. ¶21; Sage Decl. ¶5. As a result, even the most
3 knowledgeable members of the Non-Ag Pool were unsure of the Appropriative Pool's actual
4 plans.

5 And, as discussed previously, the Peace II Option Agreement contained a secondary option
6 precisely because exercise of the Peace II Option was not inevitable.

7 **C. The August 27 Agenda Package Was Not Proper Notice**

8 **1. Party Exercising Option Must Strictly Comply with Terms of Option**

9 The suggestion that the August 27 agenda package was proper notice flies in the face of
10 well-established authority requiring strict compliance with notice requirements in an option
11 contract. "An option is an offer by which a promisor binds himself in advance to make a contract
12 if the optionee accepts the terms and within the time designated in the option. Since the optionor
13 is bound while the optionee is free to accept or not as he chooses, courts are strict in holding an
14 optionee to exact compliance with the terms of the option." Hayward Lumber & Inv. Co. v.
15 Construction Prod. Corp., 117 Cal.App.2d 221, 229 (2nd Dist. 1953) (option to renew lease);
16 Simons v. Young, 93 Cal.App.3d 170, 182 (4th Dist. 1979) (option to renew lease); Bekins
17 Moving & Storage Co. v. Prudential Insurance Co., 176 Cal.App.3d 245 (2nd Dist. 1985) (option
18 to renew lease). "[W]here, as here, the acceptance or the "election" or the "exercise" of the
19 option is by the terms of the contract to be made in a particular manner, it must be strictly so
20 made in order to constitute a valid acceptance." Callisch v. Franham, 83 Cal.App.2d 427 (3rd
21 Dist. 1948) (option to purchase real estate).

22 **2. Notice of Exercise of An Option Must Be Clear and Unequivocal**

23 A notice of exercise of an option must be clear and unequivocal in order to be effective.
24 "A clear and unambiguous notice, timely given, and in the form prescribed by the contract, is
25 essential to the exercise of an option". Contracts, Corpus Juris Secundum (June 2009) (option to
26 terminate). The party exercising an option must inform the optionor "in unequivocal terms of his
27 unqualified intention to exercise his option". Hayward, 117 Cal.App.2d at 227-228; Bekins, 176
28 Cal.App.3d at 251.

1 In an act of historical re-construction, Watermaster staff and counsel claim that the agenda
2 package for the August 27 meeting of the Watermaster Board was sufficient notice. Bowcock
3 Decl. ¶23 & Exhibit R at pp. 4 & 8; Penrice Decl. ¶¶7 & 8. Among other problems with this
4 claim, the August 27 agenda package was never actually sent to the members of the Non-Ag
5 Pool. Instead, Watermaster staff claims that an e-mail was circulated by them on August 21,
6 2009 which merely stated as follows:

7 The Advisory Committee for Thursday, August 27, 2009 at 9:00 a.m. and the
8 Watermaster Board for Thursday, August 27, 2009 at 11:00 agendas and packages
9 are now available on our ftp site (address below) for your review and/or
download.

10 Bowcock Decl. ¶28, Exhibit T. Nothing about this August 21 e-mail gives the recipient any
11 reason to believe that the Peace II Option was being exercised. A recipient of the August 21 e-
12 mail would have had to navigate to the Watermaster's ftp site (Bowcock Decl. ¶29 and Exhibit
13 U), then find the correct folder within the ftp site among numerous folders (Bowcock Decl. ¶29
14 and Exhibit V), then find the correct agenda package (which was a different document than the
15 agenda itself) among numerous files (Bowcock Decl. ¶29 and Exhibit W), and then open up the
16 correct agenda package (which was posted on the ftp site as a 39.50MB file (Bowcock Decl. ¶29
17 and Exhibit W) which, as a practical matter, can only be downloaded using a high speed internet
18 connection) and if the recipient had then printed or scrolled through the 144 pages of that
19 particular agenda package (Bowcock Decl. ¶29 and Exhibit X), the recipient would have found
20 buried in about the middle of the agenda package a one-page document attached to a staff report
21 which clearly described the document as a "form of notice" being submitted solely for
22 Watermaster Board consideration. Bowcock Decl. ¶29. If the recipient of the e-mail had then
23 reviewed the minutes of that Watermaster Board meeting (posted about 30 days later), the
24 recipient would have learned that the Watermaster Board (as stated previously) had not approved
25 the intended use of the Non-Ag Storage Water, which was an essential element of the written
26 Notice of Intent to Purchase. Bowcock Decl. ¶16.

27 The notice of acceptance must show "a clear intention on the part of the respondent to
28 exercise its option on the precise terms stated in the option". Braun v. MacLaughlin Company,

1 93 Cal.App. 116, 120 (1st Dist. 1928). In the Braun case, it was undisputed that the optionor had
2 received a written notice stating that the optionee "has decided to exercise the option". Id. The
3 question in the Braun case was whether the words "has decided" in the written notice were
4 sufficiently clear. Id. In this case, the Appropriative Pool made no written communication to the
5 Non-Ag Pool even remotely close to the notice that was debated in Braun. If this court were to
6 relax the standard for "written notice" to such a low threshold of-clarity as Watermaster staff and
7 the Appropriative Pool now seeks to establish, the certainty required by the phrase "written
8 notice" in personal, commercial and governmental transactions in California would be seriously
9 undermined.⁴

10 3. Subsequent Conduct Confirms That No Notice Was Given On August 21

11 The conduct of the Appropriative Pool and Watermaster staff after August 21 confirms
12 that written Notice of Intent to Purchase was not given by virtue of the August 21 e-mail. As
13 stated previously, the staff report submitted for the public meeting of the Appropriative Pool on
14 November 5, 2009 (more than 2 months after August 21) contained the following statement
15 directly inconsistent with the notion that the written Notice of Intent to Purchase had previously
16 been given:

17 Staff recommends that the Appropriative Pool direct Watermaster to issue the
18 Notice of Intent to Purchase prior to December 21, 2009 and place the water
purchased in storage pursuant to the proposed Plan.

19 Bowcock Decl. ¶18, Exhibit N at p. 2. As stated previously, in documents submitted by staff to
20 the Advisory Committee and the Watermaster Board, at public meetings held on November 19,
21 2009 (almost three months later) staff reminded the Watermaster Board and the Pools that written
22 Notice of Intent to Purchase had still not been given. The staff's documents stated that:

23 By December 21, 2009, Watermaster, under the direction of the Appropriative
24 Pool, will send the Notice of Intent to Purchase pursuant to the Purchase and Sale
Agreement.

25 Bowcock Decl. ¶20 and Exhibit Q at pp. 4 & 9. In addition, as stated previously, even though
26

27 ⁴ In addition to other problems with the contention that the August 21 e-mail was proper notice,
28 the Appropriative Pool is unable to explain why the e-mail was sent to more than 200 e-mail
addresses, but was only sent to about half of the 10 members of the Non-Ag Pool who held the
Non-Ag Storage Water.

1 Peace II Option Agreement required that payment occur within 30 days of written Notice of
2 Intent to Purchase, staff did not tender checks to members of the Non-Ag Pool until mid-January
3 2010 (almost five months after the August 21 e-mail). Bowcock Decl. ¶24; Penrice Decl. ¶9.

4 The Appropriative Pool's efforts to re-write history are inconsistent with the known facts.

5 4. **The Judgment Requires Notice By U.S. Mail**

6 The Peace II Option Agreement specifically required that the Notice of Intent to Purchase
7 be "written". Bowcock Decl. ¶11, Exhibit E at § C. The Judgment in this action specifically
8 requires notice by U.S. mail:

9 Delivery to or service upon any party or active party by Watermaster, by any
10 other party, or by the Court, of any item required to be served upon or delivered to
11 such party or active party under or pursuant to the Judgment shall be made
12 personally or by deposit in the United States mail, first class, postage prepaid,
addressed to the designee and at the address in the latest designation filed by such
party or active party.

13 Judgment, ¶59. The members of the Non-Ag Pool never received a written Notice of Intent to
14 Purchase, by U.S. mail or otherwise.

15 D. **The Appropriative Pool Could Not Have Delivered A Valid Notice Consistent with**
16 **Plan B**

17 As discussed previously, the Peace II Option Agreement required that the Appropriative
18 Pool specifically disclose, on the face of the written Notice of Intent, the uses to which the Non-
19 Ag Storage Water would be put. Bowcock Decl. ¶11, Exhibit E at § C. As a material part of the
20 bargain between the Non-Agricultural Pool and the Appropriative Pool, the uses were specifically
21 limited to "Desalter Replenishment" or "a Storage and Recovery Program". *Id.* Desalter
22 Replenishment and a Storage and Recovery Program were thought to have basin-wide benefits,
23 not just benefits to the Appropriative Pool. Bowcock Decl. ¶11. If the Appropriative Pool had
24 approved a written Notice of Intent consistent with Plan B, it would have been obvious to all
25 concerned that the notice was defective. Plan B allowed the Appropriative Pool complete control
26 over the Non-Ag Storage Water, including the option to distribute the Non-Ag Storage Water
27 directly to themselves. Distribution of the Non-Ag Storage Water directly to the Appropriative
28 Pool was not permitted by Section C of the Peace II Option Agreement. Bowcock Decl. ¶11.

Moreover, Plan B required that the Non-Ag Storage Water be held "in trust for the members of the Appropriative Pool", but the Rules and Regulations of Watermaster specifically required that "Watermaster shall obtain Court approval prior to acquiring any water rights in trust for the benefit of the parties to the Judgment". Bowcock Decl. ¶30, Exhibit Y, § 7.1(e). The Rules and Regulations were approved by and became effective by Order of this Court entered on July 19, 2001. Request for Judicial Notice ¶4. If the Appropriative Pool had approved a written Notice of Intent consistent with Plan B, it would have been obvious to all concerned that the notice violated the Rules and Regulations, in addition to violating the Peace II Option Agreement.

IV. CONCLUSION

The Appropriative Pool's complicated strategy to obtain a windfall by auctioning the Non-Ag Pool's water to Colorado, Texas and New York investors outside the basin failed. Written Notice of Intent to Purchase was never given, and could not have validly been given after Plan B was approved. Without regard to the requirements of the Peace II Option Agreement or the Rules and Regulations, the Appropriative Pool now simply wants to use its dominance of Watermaster to seize the Non-Ag Storage Water as if the written Notice of Intent had been given. Although the written Notice of Intent to Purchase was not given, the Non-Ag Storage Water is still available to the Appropriative Pool pursuant to the secondary option, on the terms therein, including a slightly higher option price, cutting only marginally into the huge windfall that the Appropriative Pool could achieve through a successful, re-scheduled auction.

For the foregoing reasons, the Non-Ag Pool hereby seeks entry of an Order, in the form accompanying this Motion, (a) that Watermaster on behalf of the Appropriative Pool did not provide written Notice of Intent to Purchase within the time and manner provided by the Peace II Option Agreement; and (b) all of the Non-Ag Storage Water should be restored to the accounts of the members of the Non-Ag Pool.

Date: March 16, 2010

HOGAN & HARTSON LLP

By: 

ALLEN W. HUBSCH

Attorneys for Non-Agricultural (Overlying) Pool

CHINO BASIN WATERMASTER

Case No. RCV 51010

Chino Basin Municipal Water District v. The City of Chino

PROOF OF SERVICE

I declare that:

I am employed in the County of San Bernardino, California. I am over the age of 18 years and not a party to the within action. My business address is Chino Basin Watermaster, 9641 San Bernardino Road, Rancho Cucamonga, California 91730; telephone (909) 484-3888.

On March 16, 2010 I served the following:

- 1) **NOTICE OF MOTION AND MOTION BY NON-AGRICULTURAL (OVERLYING) POOL COMMITTEE FOR COURT REVIEW OF WATERMASTER ACTIONS PURSUANT TO SECTION 31 OF JUDGMENT; MEMORANDUM IN SUPPORT THEREOF**

☒ BY MAIL: in said cause, by placing a true copy thereof enclosed with postage thereon fully prepaid, for delivery by United States Postal Service mail at Rancho Cucamonga, California, addresses as follows:

See attached service list: Mailing List 1

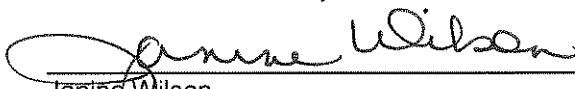
☐ BY PERSONAL SERVICE: I caused such envelope to be delivered by hand to the addressee.

☐ BY FACSIMILE: I transmitted said document by fax transmission from (909) 484-3890 to the fax number(s) indicated. The transmission was reported as complete on the transmission report, which was properly issued by the transmitting fax machine.

☒ BY ELECTRONIC MAIL: I transmitted notice of availability of electronic documents by electronic transmission to the email address indicated. The transmission was reported as complete on the transmission report, which was properly issued by the transmitting electronic mail device.

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

Executed on March 16, 2010 in Rancho Cucamonga, California.


Janine Wilson
Chino Basin Watermaster

MICHAEL CAMACHO
6055 ZIRCON AVE.
RANCHO CUCAMONGA, CA 91701

KEN WILLIS
LEAGUE OF CA HOMEOWNERS
99 "C" STREET, SUITE 209
UPLAND, CA 91786

ROBERT BOWCOCK
INTEGRATED RESOURCES MGMNT
405 N. INDIAN HILL BLVD
CLAREMONT, CA 91711-4724

MICHAEL WHITEHEAD
P.O. BOX 6010
EL MONTE, CA 91734

GEOFFREY VANDEN HEUVEL
CBWM BOARD MEMBER
8315 MERRILL AVENUE
CHINO, CA 91710

PAUL HOFER
11248 S TURNER AVE
ONTARIO, CA 91761

BOB KUHN
669 HUNTERS TRAIL
GLEN DORA, CA 91740

CHARLES FIELD
4415 FIFTH STREET
RIVERSIDE, CA 92501

TOM HAUGHEY
CITY OF CHINO
PO BOX 667
CHINO, CA 91708-0667

GLEN DURRINGTON
5512 FRANCIS ST
CHINO, CA 91710

ROBERT DELOACH
P.O.BOX 638
RANCHO CUCAMONGA, CA 91729

BOB FEENSTRA
P.O. BOX 17482
ANAHEIM HILLS, CA 92817

MARK KINSEY
10575 CENTRAL AVE.
P.O. BOX 71
MONTCLAIR, CA 91763

Members:

Al Lopez	lopezsixto@netzero.net
Alice Shiozawa	afshioza@gswater.com
Andy Campbell	acampbell@ieua.org
Andy Malone	amalone@wildermuthenvironmental.com
Anthony La	ala@ci.upland.ca.us
April Woodruff	awoodruff@ieua.org
Arnold Rodriguez	jarodriguez@sarwc.com
Ashok Dhingra	ash@akdconsulting.com
Ben Lewis	benjamin.lewis@gswater.com
Ben Pak	bpak@cbwm.org
Bill Kruger	citycouncil@chinohills.org
Bill Thompson	bthompson@ci.norco.ca.us
Bob Bowcock	bbowcock@irmwater.com
Bob Bowcock	bbowcock@irmwater.com
Bob Feenstra	bobfeenstra@gmail.com
Bob Kuhn	bgkuhn@aol.com
Bob Lawhn	rlawhn@rrienergy.com
Bonnie Tazza	bonniet@cvwdwater.com
Brenda Fowler	baee@fontanawater.com
Brian Geye	bgeye@autoclubspeedway.com
Brian Hess	bhess@niagarawater.com
Carl Hauge	chauge@water.ca.gov
Charles Field	cdfield@att.net
Charles Moorrees	cmoorrees@sawaterco.com
Cindy Cisneros	Cindy_Cisneros@ci.pomona.ca.us
Cindy LaCamera	clacamera@mwdh2o.com
Craig Stewart (craig.stewart@amec.com)	craig.stewart@amec.com
Curtis Stubbing	Curtis_Stubbings@praxair.com
Dan Arrighi	darrighi@sgwater.com
Dan Hostetler	dghostetler@csupomona.edu
Dave Argo	argodg@bv.com
Dave Crosley	DCrosley@cityofchino.org
David D DeJesus	tvwmddiv2rep@gmail.com
David D DeJesus	davidcicgm@aol.com
David Penrice	dpenrice@acmwater.com
David Ringel	david.j.ringel@us.mwhglobal.com
David Starnes	david.starnes@mcmcn.net
Dennis Poulsen	dpoulsen@californiasteel.com
Dennis Williams	dwilliams@geoscience-water.com
Diana Sturgeon	dsturgeon@chinohills.org
Don Cutler	dcutler@jcsd.us
Don Galleano	donald@galleanowinery.com
Donna Stokes	dstokes@cityofchino.org
Earl Elrod	earl.elrod@verizon.net
Edward Gonsman	Edward.Gonsman@cdcr.ca.gov
Eldon Horst	ehorst@jcsd.us
Eunice Ulloa	eulloa@cbwcd.org
Frank Brommenschenkel	frank.brommen@verizon.net
Frank LoGuidice	faloguidice@sgwater.com
Gene Koopman	GTKoopman@aol.com
Geoff Willis	gwillis@sheppardmullin.com
Geoffrey Vanden Heuvel	GeoffreyVH@juno.com
Gerald Yahr	yahrj@koll.com
Gerard Thibeault	gthibeault@rb8.swrcb.ca.gov
Geye, Brian	BGeye@autoclubspeedway.com
Grace Cabrera	grace_cabrera@ci.pomona.ca.us
Greg Woodside	gwoodside@ocwd.com
Ida Martinez	idam@cvwdwater.com
Isabel Martinez	imartinez_wfa@verizon.net
Jack Safely	jsafely@wmwd.com
James Jenkins	cnomgr@airports.sbcounty.gov

Jeff Pierson	jpierson@unitexcorp.com
Jeffrey L. Pierson	jpierson@intexcorp.com
Jill Willis	jnwillis@bbklaw.com
Jim Hill	jhill@cityofchino.org
Jim Taylor	jim_taylor@ci.pomona.ca.us
Joe Graziano	jgraz4077@aol.com
Joe P LeClaire	jleclaire@wildermuthenvironmental.com
John Anderson	janderson@ieua.org
John Ayers	jayers@sunkistgrowers.com
John Bosler	JohnBo@cvwdwater.com
John Huitsing	johnhuitsing@gmail.com
John Kennedy	jkennedy@ocwd.com
John Mura	jmura@chinohills.org
John Rossi	jrossi@wmwd.com
Jon Lambeck	jlambeck@mwdh2o.com
Jorge Rosa Jr.	Jorge.Rosa@sce.com
Julie Velez	JVelez@sdewa.org
Justin Brokaw	jbrokaw@hughes.net
Karen Johnson	kejwater@aol.com
Kathy Kunysz	kkunysz@mwdh2o.com
Kathy Tiegs	Kathyt@cvwdwater.com
Ken Jeske	kjeske@eee.org
Ken Kules	kkules@mwdh2o.com
Ken Manning	KManning@CBWM.ORG
Ken Waring	kwaring@jcsd.us
Kenneth Willis	kwillis@homeowners.org
Kevin Blakeslee	kblakeslee@dpw.sbcounty.gov
Kevin Sage	Ksage@IRMwater.com
Kurt Berchtold	kberchtold@rb8.swrcb.ca.gov
Kyle Snay	kylesnay@gswater.com
Lindsay Gomez	lgomez@wildermuthenvironmental.com
Lisa Hamilton	Lisa.Hamilton@corporate.ge.com
Marguerite P Battersby	pbattersby@sheppardmullin.com
Maribel Sosa	Maribel_Sosa@ci.pomona.ca.us
Mark Norton	mnorton@sawpa.org
Marsha Westropp	MWestropp@ocwd.com
Martin Zvirbulis	martinz@cvwdwater.com
Michael Whitehead	mlwhitehead@sgwater.com
Michelle Lauffer	mlauffer@jcsd.us
Mike Thies	mthies@spacecenterinc.com
Neil Miller	neil_miller@ci.pomona.ca.us
W. C. "Bill" Kruger	wkrugers@earthlink.net
W. C. "Bill" Kruger	citycouncil@chinohills.org

Members:

Manuel Carrillo	Manuel.Carrillo@SEN.CA.GOV
Maria Linzay	mlinzay@ci.upland.ca.us
Maria Mendoza	mmendoza@wildermuthenvironmental.com
Maribel Sosa	Maribel_Sosa@ci.pomona.ca.us
Mark Kinsey	mkkinsey@mvwd.org
Mark Ward	mark_ward@ameron-intl.com
Mark Wildermuth	mwildermuth@wildermuthenvironmental.com
Marla Doyle	marla_doyle@ci.pomona.ca.us
Marsha Westropp	MWestropp@ocwd.com
Martha Davis	mdavis@ieua.org
Martin Rauch	martin@rauchcc.com
Martin Zvirbulis	martinz@cvwdwater.com
Marv Shaw	mshaw@ci.ontario.ca.us
Masha Klachko Blair	mklachko-blair@bhfs.com
Maynard Lenhert	directorlenhert@mvwd.org
Melanie Otero	melanie_otero@ci.pomona.ca.us
Michael Camacho	mcamacho@pacificaservices.com
Michael T Fife	MFife@bhfs.com
Mike Maestas	mmaestas@chinohills.org
Mohamed El-Amamy	melamamy@ci.ontario.ca.us.
Nate Mackamul	Nate.Mackamul@cdcr.ca.gov
Nathan deBoom	n8deboom@gmail.com
Pam Sharp	PSharp@chinohills.org
Pam Wilson	pwilson@bhfs.com
Pat Glover	pglover@cityofchino.org
Patrick Mead	pmead@dpw.sbcounty.gov
Patrick Sheilds	psheilds@ieua.org
Paul Deutsch (paul.deutsch@amec.com)	paul.deutsch@amec.com
Paul Hofer	farmwatchtoo@aol.com
Paul Schenk	pschenk@ldking.com
Peggy Asche	peggy@wvwd.org
Pete Hall	r.pete.hall@cdcr.ca.gov
Peter Hettinga	peterhettinga@yahoo.com
Phil Krause	pkrause@parks.sbcounty.gov
Phil Rosentrater	prosentrater@wmwd.com
Raul Garibay	raul_garibay@ci.pomona.ca.us
Richard Atwater	Atwater@ieua.org
Rick Hansen	rhansen@tvmwd.com
Rick Rees (Richard.Rees@amec.com)	Richard.Rees@amec.com
Rob Vanden Heuvel	Robert.t.van@gmail.com
Robert C. Hawkins	RHawkins@earthlink.net
Robert Cayce	rcayce@airports.sbcounty.gov
Robert DeLoach	robertd@cvwdwater.com
Robert Neufeld	rneufeld@sbvwcd.dst.ca.us
Robert Nobles	Robert.Nobles@cdcr.ca.gov
Robert Tock	rtock@jcsd.us
Robert Young	rkyoung@fontanawater.com
Roger Han	roger_han@praxair.com
Ron Craig	RonC@rbf.com
Sam Fuller	samf@sbvmwd.com
Sandra S. Rose	directorrose@mvwd.org
Sandy Lopez	slopez@ci.ontario.ca.us
Sarah Kerr	skerr@ci.ontario.ca.us.
Sarah Schneider (sarah.schneider@amec.com)	sarah.schneider@amec.com
Scott Burton	sburton@ci.ontario.ca.us
Scott Slater	sslater@bhfs.com
Shaun Stone	sstone@ci.upland.ca.us
Sherrie Schnelle	sschnelle@chinohills.org
Sonya Bloodworth	sbloodworth@wmwd.com
Steve Arbelbide	sarbelbide@californiasteel.com
Steve Nix	snix@chinohills.org

Steve Riboli
Ted Leaman
Terry Catlin
Tim Hampton
Tim Skrove
Toby Moore
Tom Cruikshank
Tom Harder
Tom Haughey
Tom Love
Toni Medel
Tracy Tracy
Umesh Shah
Van Jew
Vicki Hahn
William P. Curley
WM Admin Staff

steve.riboli@sanantoniowinery.com
tleaman@sunkistgrowers.com
tcatlin@verizon.net
tim_hampton@ci.pomona.CA.US
tskrove@mwdh2o.com
TobyMoore@gswater.com
tcruikshank@spacecenterinc.com
thomas_harder@att.net
tom@haugheyinsurance.com
TLove@ieua.org
mmedel@RBF.com
ttracy@mvwd.org
ushah@jcsd.us
vjew@mvwd.org
vhahn@tvmwd.com
wcurley@rwglaw.com

Members:

Alfred E. Smith	asmith@nossaman.com
Allen W. Hubsch	awhubsch@hhlaw.com
Amy Steinfeld	asteinfeld@bhfs.com
Andrew Lazenby	lazenbyag@bv.com
Art Kidman	akidman@mkblawyers.com
Barbara Swanson	Barbara_Swanson@yahoo.com
Beth Barry	bethb@cvwdwater.com
Bob Feenstra	bobfeenstra@gmail.com
Carol	marie@tragerlaw.com
Carol Davis	cdavis@lagerlof.com
Chris Swanberg	chris.swanberg@corr.ca.gov
Dan McKinney	dmckinney@rhlaw.com
Eric Garner	elgarner@bbklaw.com
Fred Fudacz	ffudacz@nossaman.com
Jean Cihigoyenetché	Jean_CGC@hotmail.com
jeeinc@aol.com	jeeinc@aol.com
Jennifer Novak	jennifer.novak@doj.ca.gov
Jill Willis	jnwillis@bbklaw.com
Jim Markman	jmarkman@rwglaw.com
Jim@city-attorney.com	Jim@city-attorney.com
jimmy@city-attorney.com	jimmy@city-attorney.com
John Cotti	jcotti@localgovlaw.com
John Schatz	jschatz13@cox.net
Joseph S. Aklufi	AandWLaw@aol.com
Kuperberg, Joel	jkuperberg@rutan.com
Marguerite P Battersby	pbattersby@sheppardmullin.com
Mark Hensley	mhensley@localgovlaw.com
Michelle Staples	mstaples@jdplaw.com
Rodney Baker	rodbaker03@yahoo.com
smt@tragerlaw.com	smt@tragerlaw.com
Steve Kennedy	skennedy@bbmblaw.com
Steven K. Beckett	skbeckett@bbmblaw.com
Steven Lee	slee@rhlaw.com
Steven R. Orr	sorr@rwglaw.com
Tom Bunn	TomBunn@Lagerlof.com
Tom McPeters	THMcP@aol.com
Tram Tran	ttran@mkblawyers.com
William J. Brunick	bbrunick@bbmblaw.com
William P. Curley	wcurley@rwglaw.com