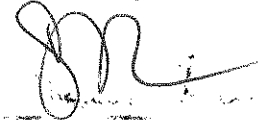


FILED-CHINO DISTRICT
SUPERIOR COURT
SAN BERNARDINO COUNTY

JUN 18 2010



SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

CHINO BASIN MUNICIPAL WATER
DISTRICT,

Plaintiff,

vs.

CITY OF CHINO, et al.,

Defendants

CASE NO. RCV 51010

[TENTATIVE]
RULING AND ORDER

Date: June 18, 2010

Dept: C-1

Time: 10:30 a.m.

The motion of the Nonagricultural Pool (Overlying) Committee (joined by California Steel Industries) is denied for the reasons set forth herein.

REQUEST FOR JUDICIAL NOTICE

The Court grants the request for judicial notice as follows:

- 1) judgment of January 27, 1978, as amended;
- 2) the order concerning the motion for approval of the peace II documents entered December 21, 2007;
- 3) watermaster compliance with December 21, 2007 order conditions one and two filed on or about May 1, 2008;
- 4) order granting final approval of watermaster rules and regulations, approving

1 intervention of CCG Ontario, continuance of hearing re status report, filing of
2 motions to amend judgment entered on or about July 19, 2001.

3 The court grants the joinder of California Steel Industries, Inc., in the motion.
4

5 **RULINGS AND ORDER: PURCHASE AND SALE AGREEMENT**

6 The pertinent paragraphs of the purchase and sale agreement which are the
7 subject matter of this motion are as follows:

8 **C: “Notice.** Within 24 months of the final Court approval of this
9 Agreement (“Effective Date”), and only with the prior approval of the
10 Appropriative Pool, Watermaster will provide written **Notice of Intent**
11 **to Purchase** the Non-Agricultural (Overlying) Pool water pursuant to
12 Section 5.3(a) of the Peace Agreement, which therein identifies whether
13 such payment will be in connection with Desalter Replenishment or a
14 Storage and Recovery Program.
15

16 **H. Early termination.** This agreement will expire and be of no further
17 force and effect if: Watermaster does not issue its **Notice of Intent to**
18 **Purchase** in accordance with Paragraph D above within twenty-four
19 (24) months of Court approval. Upon Watermaster’s failure to satisfy
20 the condition subsequent, the rights of the Non-Agricultural (Overlying)
21 Pool will remain unaffected and without prejudice as a result of their
22 having executed this Agreement except that in the event of Early
23 Termination, the Storage Transfer Quantity, will then be made available
24 for purchase by Watermaster and thence the members of the
25 Appropriative Pool in accordance with Paragraph 9.(iv) of Amended
26 Exhibit G, the Overlying (Non-Agricultural) Pool, Pooling Plan,
27 including the requirement of a ten per cent dedication towards Desalter
28 replenishment. (Bold type in original.)

1 The purchase and sale agreement had one signature by a representative of the
2 nonagricultural overlying pool.

3
4 Initial Matters Not Subject To Dispute

5 There is no dispute that December 21, 2009, was the deadline for the written
6 notice of intent to purchase.¹

7 There is also no dispute that the purchase and sale agreement had no further
8 specification with respect to the written notice of intent to purchase.

9 The non-agricultural pool characterizes the motion to have the court find and
10 declare pursuant to §31 of the judgment that:

11 1. watermaster on behalf of the appropriative pool did not deliver to the
12 members of the non-agricultural pool a notice of intent to purchase in the time and
13 in the manner required by the purchase and sale agreement for the purchase of water
14 by watermaster from the overlying (non-agricultural) pool dated September 27, 2007;
15 and

16 2. all of the water subject thereto should be restored to the accounts of the
17 members of the non-agricultural (overlying) pool.

18 The court characterizes the motion as whether the appropriative pool, through
19 watermaster, complied with paragraphs C and H of the purchase and sale agreement.

20
21
22 .1. The notice of intent to purchase

23 Page 43, Exhibit X (to the Bowcock declaration) contains the document
24 entitled "Notice of Intent to Purchase" which states:

25 Pursuant to Section C of the *Purchase and Sale Agreement for the*
26 *Purchase of Water by Watermaster from Overlying (Non-Agricultural) Pool,*
27

28

¹ Except for quotations, the court is not following the convention of capitalization from the moving and opposing papers. The court considers the convention to be unnecessary.

1 Watermaster hereby provides notice to the Overlying (Non-
2 Agricultural) Pool that Watermaster intends to tender purchase of
3 the Storage Transfer Quantity pursuant to the terms of the
4 Purchase and Sale Agreement for the following uses: 36,000 acre
5 feet for use in a Storage and Recovery Agreement, and 2652 acre-
6 feet for use as Desalter replenishment.

7
8 On August 13, 2009, the Appropriative Pool provided approval
9 for the issuance of this notice. The date of issuance of this notice
10 is December 18, 2009.

11 asdBackground of the purchase and sale agreement

12 Initially, allocated specific quantities of water were tied to the land and could
13 not be sold. However, since 1978, changes in the non-agricultural pool resulted in
14 lower water demands and a large amount of unused non-agricultural pool water in
15 storage. The peace agreement (peace I) deleted the requirement tying the water
16 quantities to the land and allowed transfer of non-agricultural pool water outside of
17 the non-agricultural pool. There was a limitation on the transfers: 1) watermaster's
18 acquisition of the water for desalter replenishment; or 2) use in a storage and
19 recovery program.

20 The problem is that the modest amendment from the initial peace agreement
21 did not have a meaningful impact on the accumulation of groundwater in storage.
22 As of July 2007, more than 52,000 acre-feet had accumulated in the non-agricultural
23 pool members' storage accounts. Therefore, the court approved further amendment
24 to the judgment authorizing certain "physical solution transfers," and approved the
25 purchase and sale agreement allowing the non-agricultural pool to sell all of its water
26 in storage at a defined price, generally equivalent to the prevailing market price.

27 Under the "physical solution transfers," and the purchase and sale agreement,
28 the non-agricultural pool had to dedicate 10% of any transferred quantity of water to

1 watermaster for the purpose of desalter replenishment.

2 Therefore a new amendment to the judgment (apparently from July 2007) for
3 the first time allowed the non-agricultural pool members to transfer their surplus
4 water on a yearly basis to watermaster and then to the appropriative pool for the
5 individual use of the members of the appropriative pool.

6 Under the purchase and sale agreement, the non-agricultural pool members
7 agreed to sell all of their water in storage to watermaster in a manner consistent with
8 the peace I agreement section 5.3(e) for use as either 1) water for desalter
9 replenishment, or 2) for use in a storage and recovery agreement.

10 As part of the purchase and sale agreement, the requirement for a written
11 notice of intent to purchase was part of a larger context referred to as the peace II
12 agreement.

13 Because the appropriative pool needed time to consider whether to buy the
14 full amount of water in storage, as well as time to consider how best to pay for the
15 water and the uses to which the water could be put, section C of the agreement
16 contained a condition that required watermaster to provide written notice of intent to
17 purchase the water within a specified period of time.

18 If the appropriative pool did not provide the notice of intent to purchase by
19 December 21, 2009, the secondary option provided that the nonagricultural storage
20 water will be available on the terms therein for purchase by the appropriative pool at
21 92% of the current MWD of Southern California replenishment rate. If this option
22 went into effect, the nonagricultural pool would receive an incremental benefit of
23 \$112 per acre foot. If a proposed auction resulted in prices up to \$1000 per acre foot
24 as watermaster CEO Manning is claimed to have asserted at one time, then the
25 appropriative pool might realize the benefit of about \$663 per acre foot, or about
26 \$25,500,000 in the aggregate.

27 Back in 2007, when the court approved the peace II measures, it was very
28 important to the court that the updated recharge master plan be completed. The

1 completion of the recharge master plan update is the final condition subsequent that
2 must be satisfied under the December 21, 2007, court order.

3 To raise money for the recharge master plan, watermaster wanted to offer
4 third parties an opportunity to participate in a storage and recovery program using
5 the purchased water.

6 The watermaster board selected an auction of the stored water and associated
7 storage capacity as a fair and transparent method to obtain the highest possible
8 return that also had conditions to avoid any material physical injury (pursuant to the
9 judgment).

10 On August 11, 2009, the court approved watermaster's proposed auction for
11 the water that watermaster bought from the non-agricultural pool and a
12 corresponding amount of storage capacity and then to use the money from the
13 auction to fund the recharge master plan.

14 However, the auction never took place, for reasons not relevant to this
15 motion.

16 ///

17 ///

18 ///

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20 ///

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23 ///

24
25
26 2. Substance and structure of watermaster administration

27 The parties to the judgment are broken down into three groups, with the
28 following subgroups and representation:

	Total number of members	Members on the pool committee	Number of representatives on the 9 member watermaster board	Number of representatives on the advisory 39 member committee
Agricultural pool	100+	7	2	7
Nonagricultural (overlying) Pool ²	19	19	1	3
Appropriative Pool	Not specified	Not specified	3	26
			One member appointed from each of the following entities: ↓	
1. Three Valleys Municipal Water District; 2. Western Municipal Water District; 3. Chino Basin Municipal Water District				

According to the §38 of the judgment, each pool has a pool committee, and the purpose of the pool committee is “the power and responsibility for developing policy recommendations for the administration of its particular pool.”

Watermaster has a full-time staff of about 10 individuals. The role and function of watermaster staff is to perform administrative tasks on behalf of the pool committees.

THE AGRICULTURAL POOL

The agricultural pool has water allocated as a group, not as individuals. The 1978 judgment envisions that agricultural pool production would diminish as agricultural land was converted to municipal use. The judgment has a detailed procedure to transfer unproduced agricultural pool water to the appropriative pool. It appears to the court that the agricultural pool initially consisted largely of dairy

² The City of Ontario is a member of both the nonagricultural (overlying pool) and a member of the appropriative pool. It is the largest holder of nonagricultural pool rights, and it is also the largest appropriator in the basin. It is the chairman of the appropriative pool.

1 farms.

3 THE APPROPRIATIVE POOL

4 This group has specific allocated quantities of water by party. Any
5 appropriator who produces less than his assigned right may carry such unpumped
6 water forward for use in subsequent years. The appropriative rights may be assigned,
7 leased, or licensed to another appropriator for exercise any given year.

8 However, a limitation on the appropriative pool is that if safe yield is reduced,
9 any shortfall is debited (i.e., subtracted) from the appropriative Pool. If there is such
10 a reduction, the appropriative pool will have to be reduced to zero before either of
11 the other two overlying pools would be affected.

12 Water companies are members of members of the appropriative pool. The
13 Chino Basin is a key component of their water supply.

14 The members of the appropriative pool appoint individuals whose sole or
15 principal job is water supply, and these individuals serve as representatives on the
16 appropriative committee. These representatives follow watermaster matters closely,
17 communicate frequently, and attend all or almost all watermaster meetings.

19 THE NON-AGRICULTURAL POOL

20 The nonagricultural pool has individual allocated specific quantities of water
21 per party. They can carry over unproduced water for use in future years.

22 The nonagricultural pool committee is composed of all members of the
23 nonagricultural pool unlike the agricultural pool which has over 100 members.

24 Each member of the pool committee votes individually. The nonagricultural
25 pool contends that no member of the pool has delegated authority to vote, or any
26 other right or power, to any other member of the nonagricultural pool. The
27 nonagricultural pool contends that there is no appointed agent for giving or receiving
28 notices.

1 Each member of the nonagricultural pool at present is an entity (as opposed to
2 a natural person). Therefore, each member of the nonagricultural pool has appointed
3 individuals to represent the member on the nonagricultural pool committee.

4 Examples of members of the nonagricultural pool are an automobile racetrack,
5 a company that owns and operates a mobile home park, and a company that
6 manufactures steel. For these companies, water is a utility like electricity or phone
7 service.

8 The members of the non-agricultural pool therefore appoint representatives to
9 the nonagricultural pool committee. These individuals are generally regular operating
10 personnel for whom responsibility for water consumption is only a small aspect of
11 their jobs. Therefore, attendance of nonagricultural pool members (who by
12 definition are also nonagricultural pool committee members) at meetings has been
13 sporadic at best over the last two years.

14 Appropriate pool and nonagricultural pool meetings were scheduled at the
15 same time and at watermaster's offices, so watermaster staff and counsel were aware
16 of the sporadic attendance of the nonagricultural pool members at pool committee
17 meetings.

18 The purchase and sale agreement applied only to pre-June 30, 2007, water in
19 storage. Only 10 of the 19 members of the nonagricultural pool had pre-June 30,
20 2007, water in storage. Most of these members did not attend any pool meetings
21 during the two-year period specified in the purchase and sale agreement.

22 23 24 3. Facts regarding the purchase and sale agreement

25 According to the declaration of Robert Bowcock³, the peace II option price
26

27 ³ Since approximately 2000, Mr. Bowcock has been the designated representative of Vulcan Materials Co. (a member of
28 the non-agricultural (overlying) pool committee) in matters relating to the nonagricultural pool. From 2003 to the
present, Mr. Bowcock has been chairman of the non-agricultural pool, and the sole representative of the nonagricultural
pool on the 9 member watermaster board, and only 1 of 3 representatives of the nonagricultural pool on the 36 member
watermaster advisory committee.

1 was about \$215 per acre foot, payable in 4 annual installments. In September 2007,
2 when the peace II option was given, the option price represented about an 8%
3 discount from the MWD replenishment rate then in effect. The MWD
4 replenishment rate in December 2007 was \$335 per acre foot. If the appropriative
5 pool had exercised the peace II option in December 2007 (the day after it became
6 effective), the appropriative pool would have realized an immediate benefit of
7 \$700,000-\$800,000.

8 Again according to the Bowcock declaration, the MWD replenishment rate
9 was \$258 per acre foot on January 1, 2008, \$294 per acre foot on January 1, 2009,
10 and \$366 per acre foot on September 1, 2009. By September 1, 2009, the fixed
11 option price of the nonagricultural storage water was a 41% discount from the MWD
12 replenishment rate. If the appropriative pool had exercised the peace II option on
13 September 1, 2009, the appropriative pool could have realized a benefit of about
14 \$5,800,000.

15 16 17 4. Attempted auction

18 In 2008 and 2009, it became clear to the appropriative pool that ongoing
19 drought conditions and regulatory restrictions on water exports from the
20 Sacramento-San Joaquin Bay Delta, which is a primary MWD source, and that the
21 ability to obtain replenishment water from the MWD would be severely limited. In
22 particular, because MWD projected that replenishment water would be available only
23 3 out of 10 years (instead of the previous projection of 7 out of 10 years),
24 watermaster's engineer explained that significant enhancements to watermaster's
25 recharge facilities would be required.

26 One of the conditions of the approval of peace II was for watermaster to
27 prepare an updated recharge master plan that describes how recharge will occur, on a
28 long-term basis, within the basin. The only method by which watermaster funds

1 operation and maintenance, as well as administrative costs and capital improvements
2 such as the recharge master plan, is through a system of assessments, or a tax on all
3 groundwater production in the appropriative pool. Under this system of
4 assessments, the appropriative pool is responsible for almost all of the costs
5 associated with improving the recharge facilities in accordance with recharge master
6 plan, even though such improvements will provide a benefit to all producers in the
7 Chino Basin. When the appropriative pool became aware of the significant costs
8 associated with these improvements, the appropriative pool began to discuss various
9 funding mechanisms.

10 Ultimately the appropriative pool determined that monetizing the purchased
11 non-agricultural pool water in storage through an auction of that water could
12 produce a viable source of funding for the significant costs of recharge
13 enhancements. According to the DeLoach declaration, absent such a funding
14 mechanism, the cost of the recharge enhancements would ultimately be borne by the
15 public ratepayers.

16 Again, according to the Bowcock declaration, in 2008 Bowcock heard that the
17 appropriative pool was going to auction the nonagricultural storage water. At one or
18 more of the pool, advisory, and board meetings that Bowcock attended, watermaster
19 staff, counsel, or both stated the auction process would allow the non-agricultural
20 storage water to be physically transported outside of the Chino Basin for
21 consumption elsewhere. Watermaster CEO Ken Manning said that watermaster and
22 the appropriative pool were targeting outside investors from such places as Colorado,
23 Texas, and New York City. The appropriative pool had established a minimum bid
24 of \$600 per acre foot, and Manning is claimed to have said he expected to receive
25 bids up to \$1000 per acre foot representing a potential profit to the appropriative
26 pool of about \$30,000,000. Watermaster staff or counsel said that a portion of the
27 proceeds would be used by the appropriative pool to pay the option price under the
28 peace II option agreement. The auction was scheduled to occur on November 4,

1 2009.

2 According to the declaration of Robert DeLoach,⁴ Bowcock was the sole
3 representative of the nonagricultural pool during the peace II negotiations. Bowcock
4 advanced the idea of selling the non-agricultural pool's water and further enhancing
5 its ability to transfer water outside of the pool for compensation. Bowcock
6 engineered and advocated the plan by which the appropriative pool would be able to
7 purchase the water in storage at "market price," which is the price that the
8 appropriative pool parties would sell or lease water between each other. That price
9 was widely recognized to be 92% of the then-current replenishment rate established
10 by the Metropolitan Water District of Southern California (MWD). Because
11 watermaster typically purchases imported water from MWD, its rate is used as a
12 benchmark for purposes of valuing other purchase or lease water supplies available
13 within or to the Chino Groundwater Basin. In exchange for the ability to sell the
14 water in storage to the appropriative pool at market price, the nonagricultural pool
15 agreed to dedicate 10% of the water to desalter replenishment. The parties also
16 negotiated mechanism whereby the nonagricultural pool would on an annual basis
17 make unused water available for purchase by the appropriative pool at market price

18 However, the auction never took place for reasons not relevant to this motion.
19
20

21 5. Watermaster staff reports, appropriative pool meetings, nonagricultural
22 pool meetings, advisory committee meetings, watermaster board meetings

23 Chino Basin watermaster staff prepared a report dated August 13, 2009, to
24 pool members with the subject line: notice of intent to purchase.⁵ The memo states
25

26 ⁴ Mr. DeLoach is the general manager and chief executive officer of Cucamonga Valley Water District (member of the
27 appropriative pool). He was actively involved in the negotiation of peace I and peace II. In 2005, he was vice chair of
28 the appropriative pool. In 2006, he was chair of the appropriative pool. In 2008, he was chair of the advisory
committee. In 2009, he was vice chair of the advisory committee. Since January 2010, he has again been chair of the
advisory committee.

⁵ Bowcock declaration, exhibit H.

1 that "watermaster staff has prepared a form of the notice to satisfy the requirements
2 of section C." The memo of proceeds to state that "staff has proposed that the date
3 of the notice be December 18, 2009, as that is the last business day before the
4 deadline for the notice. Given that the current date of the auction is unknown, the
5 date will provide maximum opportunity for the [appropriate] pool to receive the
6 proceeds of the auction prior to the required payment date and will provide
7 maximum flexibility in the event the auction is not completed as anticipated." The
8 staff report further provides that section D of the purchase and sale agreement
9 requires the payment schedule to the nonagricultural pool will commence 30 days
10 after the notice of intent to purchase ("payment date"). The recommendation was to
11 consider and approve form of notice of intent to purchase.

12 Exhibit I to the Bowcock declaration is the minutes from the joint
13 appropriate and non-agricultural pool meeting for August 13, 2009. The minutes
14 state that the notice of intent was approved. In the form notice of intent, attached to
15 the staff report (exhibit H), there is a blank to be filled in for the date "the
16 appropriate pool provided approval for the issuance of this notice." The notice
17 states that the date of issuance of the notice itself is December 18, 2009.

18 Present at the August 13, 2009, meeting were, on behalf of the nonagricultural
19 pool, Kevin Sage (an alternate for Bowcock) on behalf of Vulcan Materials and
20 Mohammed El Amamy on behalf of the City of Ontario. There was actually 38,652
21 acre-feet in the nonagricultural account as of June 30, 2007. For the appropriate
22 committee, a motion carried to place 2652 acre-feet toward an account dedicated to
23 desalter replenishment and 36,000 acre-feet toward the auction process.

24 Also at the August 13, 2009, meeting, a motion carried to approve the notice
25 of intent. The business item minute II.A. states that "non-ag noted this was for
26 information only." The court concludes that this notation was with respect to both
27 of the carried motions.

28 Bowcock declaration exhibit J is the Chino Basin watermaster staff report

1 dated August 27 also with a subject line: "notice of intent to purchase." The report is
2 essentially the same as the August 13 report. However, now the staff
3 recommendation is for approval of the notice of intent to purchase as directed by the
4 appropriative pool. The staff report now has the notice of intent attached with the
5 date filled in for August 13, 2009 as follows: "on August 13, 2009, the appropriative
6 pool provided approval for the issuance of this notice. The date of issuance of this
7 notice is December 18, 2009."

8 Exhibit K to the Bowcock declaration is the watermaster board meeting
9 minutes for August 27, 2009. Kevin Sage on behalf of Vulcan Materials Company
10 was present at this meeting. The motion carried to approve the notice of intent to
11 purchase 36,000 acre-feet for use in a storage and recovery agreement and refer 2652
12 acre-feet back to the appropriative pool for further consideration as a separate
13 motion.

14 The Bowcock declaration states the minutes show that the use of the
15 nonagricultural storage water, as proposed by the appropriative pool, was rejected by
16 the watermaster board.

17 However, the court disagrees with Bowcock's interpretation. The court
18 concludes notice of intent itself was approved, and there was no further modification
19 of it. The next watermaster staff report, dated October 1, 2009, to the appropriative
20 pool, has a subject line of "auction water disposition." This report addresses the
21 2652 acre-feet, but there is no further discussion of a notice of intent. The
22 conclusion was to recommend use the water for desalter replenishment.

23 There are additional exhibits with staff reports, and pool meeting and board
24 minutes, but the court does not find them relevant except as discussed specifically
25 below.

26 The staff report dated November 5, 2009, (Bowcock declaration exhibit N), to
27 the appropriative pool has a subject line: "proposed plan regarding disposition of
28 water purchased from nonagricultural pool." The last paragraph of this staff report

1 reads as follows: "staff recommends that the appropriative pool direct watermaster to
2 issue the notice of intent prior to December 21, 2009, and place the water purchased
3 in storage pursuant to the proposed plan."

4 Attached to this November 5, 2009 staff report is the "plan regarding
5 disposition of water purchased from the nonagricultural pool pursuant to the peace
6 II purchase and sale agreement." This is dated November 5, 2009, but it refers to the
7 auction possibly taking place on November 4, 2009, the day before. The content of
8 this document is normally referred to in the motion as plan B.

9 Bowcock (paragraph 21) describes the meetings in which watermaster staff
10 and watermaster counsel were not asked to leave confidential meetings of the
11 appropriative pool. Bowcock also says that he heard watermaster Council Michael
12 Fife and current chair of the appropriative pool, Mark Kinsey, say that they would
13 give written notice of intent to purchase to the nonagricultural pool on the last
14 possible date, or words to that effect.

15
16
17 6. Notice issue arises

18 On January 7, 2010, during a public meeting of the appropriative pool at
19 which watermaster staff was present, David Penrice, chief executive officer of Aqua
20 Capital Management (nonagricultural pool member) asked watermaster staff whether
21 and when the written notice of intent to purchase had been provided.

22 Although the characterization of how Manning and Fife conducted themselves
23 at this meeting is in dispute, there is no dispute that after this January 7, 2010
24 meeting, Fife gave to Penrice pages of the agenda package from the August 27
25 meeting of the watermaster board.

26 Then the chair of the nonagricultural pool committee, Bowcock, called a
27 special meeting of the nonagricultural pool committee by conference call on January
28 18, and asked watermaster staff and counsel to explain the circumstances relating to

1 the written notice of intent to purchase. A transcript of the conference call is
2 attached to the Bowcock declaration as exhibit R. In that conference call,
3 watermaster counsel Fife stated, "the August 27, 2009 notice satisfied the terms of
4 the purchase and sale agreement but there is also so much more."

5 The following members of the non-agricultural pool have stated in declarations
6 that they never received the notice of intent to purchase:

- 7 a. Curtis Stabbings, business director for NAIG West region, Praxair;
- 8 b. Robert Lawhn, the director, Compliance & Las Vegas Services, RRI
9 Energy Etiwanda;
- 10 c. Stephen Arbelbide, the senior environmental engineer with California
11 Steel Industries;
- 12 d. Brian Geye, the senior director of track administration for Auto Club
13 Speedway;
- 14 e. David Starnes, state facilities manager for Mobile Community
15 Management Company; Swan Lake Mobile Home Park is a member of the non-
16 agricultural pool committee, and he is the designated representative from Swan
17 Lake to the nonagricultural pool.
- 18 f. Mark Ward, the planning supervisor of Ameron.
- 19 g. Robert Bowcock, the designated representative of Vulcan Materials
20 Company in matters relating to the nonagricultural pool, and the sole
21 representative of the nonagricultural pool on the nine-member watermaster
22 board; since about 2002, Kevin Sage has been his alternate as a designated
23 representative of Vulcan.

24
25
26 7. Payment and return of payment

27 On or about January 15, 2010, watermaster staff tendered to Bowcock checks
28 made payable to various members of the nonagricultural pool, as the first installment

1 on the auction price for the nonagricultural storage water. Bowcock returned all the
2 checks on or about January 15, 2010.

3
4
5 8. LEGAL ARGUMENTS, CONCLUSIONS, FINDINGS
6

7
8 9. Characterization of the purchase and sale agreement

9 The court does not accept the arguments of the nonagricultural pool and
10 concludes that the purchase and sale agreement as set forth in ¶C is not option, for
11 the following reasons:

12 A. ¶H of the purchase and sale agreement calls the written notice of intent
13 and payment pursuant thereto a condition subsequent. The court so
14 finds.

15 B. The court concludes that the contract language itself must govern the
16 interpretation of the contract, even though there are many
17 characterizations of the rights under the contract as an option. Some of
18 those characterizations are as follows:

19 i. The watermaster brief submitted in February 1, 2008
20 (watermaster exhibit 17) refers to watermaster having an option
21 to purchase the nonagricultural pool water.

22 ii. According to the minutes for the January 2009 watermaster
23 board meeting, watermaster counsel Scott Slater referred to the
24 purchase and sale agreement as providing an option for
25 watermaster to buy water and use it for either a storage and
26 recovery agreement or in connection with desalter replenishment.
27 (Bowcock reply declaration, ¶11, Exhibit A.)

28 iii. The January 14, 2010, cover letter for the attempted payment

1 states that the appropriators have exercised option to purchase
2 the stored water.

3 C. The purchase and sale agreement was a part of an expansive negotiation
4 between represented parties as part of the peace II agreement. The
5 court must conclude that the specific words of the purchase and sale
6 agreement were carefully considered, negotiated, and agreed upon.

7 D. Reference to ¶C as an option was only a short-hand description of the
8 rights and obligations under the purchase and sale agreement, and
9 cannot vary actual wording of the contract.

10 E. *Hayward Lumber and Investment Company v. Construction products Corporation*
11 (1953) 117 Cal.App.2d 221, cited by the nonagricultural pool
12 committee, does not apply to the instant case for the following reasons.

13 i. That case is not deal with the complex relationships that have
14 grown in the instant case over more than 30 years.

15 ii. The instant case contains an affirmative, clear written notice of
16 intent to purchase which the court finds to be sufficient
17 compliance with the purchase and sale agreement.

18 iii. *Hayward* dealt with an option, and the court finds that pursuant
19 to ¶H the written notice of intent was a condition subsequent.

20 F. *Ebrlich v. Granoff* (1980) 109 Cal.App.3d 920, also cited by the
21 nonagricultural pool committee, does not apply to the instant case for
22 the reasons set forth with respect to *Hayward*.

23 G. *Riverside Fence Co., Inc. v. Novak* (1969) 273 Cal.App.2d 656, cited by
24 watermaster, also does not apply to the instant case for the reasons set
25 forth with respect to *Hayward*.

26 H. The court did not find any of the cited cases useful because of the
27 reasons set forth with respect to *Hayward*.

28 I. Although watermaster cites Civil Code §1582 regarding acceptances of

1 offers, this Civil Code is inapplicable because it deals with formation of
2 contracts not the providing of notice pursuant to the specific terms of
3 the purchase and sale agreement.
4

5
6 10. The August 13, 2009, appropriative pool and nonagricultural pool
7 meeting

8 On August 13, 2009, the appropriative pool approved a written notice of
9 intent to purchase.

10 Watermaster argues that the presence of the non-agricultural pool at this
11 meeting would be a basis for service of the written notice. The court does not make
12 such a finding because the attached notice of intent was incomplete with the date of
13 approval left blank.

14 This written notice of intent was then transmitted to the advisory committee
15 and to the watermaster board for action on August 27, 2009.
16

17
18 11. The August 27, 2009 board and advisory committee meetings

19 Watermaster argues that the notice of intent to purchase was prominently
20 displayed on the board agenda for the August 27, 2009 meeting as item II.A., and the
21 agenda item was entitled "consider approval of notice of intent to purchase as
22 directed by the appropriative pool." The board approved the notice of intent, and
23 Bowcock, a member of the nonagricultural pool, voted in favor of the approval.⁶

24 Watermaster argues that the minutes for this August 27, 2009 board meeting
25 were electronically distributed to interested parties, and the minutes of the board
26

27 ⁶ Watermaster suggests that whether and to what extent the nonagricultural pool representative communicated this
28 action other members of the pool is a relevant subject for further discovery. The court finds no basis for this, because
communication of board approval is not relevant to the motion. The question for the court is whether the notice of
intent was "provided" to the members of the nonagricultural and the condition subsequent defined in ¶H was
performed.

1 meeting were maintained on the watermaster website. The court finds this sufficient
2 compliance with the purchase and sale agreement for the following reasons:

3 A. All that the purchase and sale agreement required was that watermaster
4 “provide written notice of intent to purchase the nonagricultural
5 (overlying) pool water.”

6 B. There is no specification as to how or to whom the notice of intent be
7 provided.

8 C. There is no question that there was a written notice of intent, and the
9 written notice of intent for the August 27, 2009 watermaster board
10 meeting was complete.

11 D. Present at the August 27, 2009, watermaster board meeting was Kevin
12 Sage, Vulcan Materials Company, the nonagricultural pool.

13 E. Written notice of intent was provided to Mr. Sage at that time.

14 F. The court finds that providing the notice to Mr. Sage at the meeting was
15 sufficient to provide written notice to the nonagricultural pool for the
16 following reasons:

17 i. Only one individual signed the purchase and sale agreement on
18 behalf of the nonagricultural pool. Watermaster points out that
19 the peace agreement was executed by the pool representative Mr.
20 Arbelbide on behalf of the entire pool, and that Bowcock
21 executed the purchase and sale agreement on behalf of the pool.

22 ii. Providing the written notice of intent to one individual is
23 sufficient because only one individual signed the purchase and
24 sale agreement on behalf of the nonagricultural pool.

25 iii. Therefore the court rejects the argument of the nonagricultural
26 pool that a single individual could not be provided notice on
27 behalf of the entire nonagricultural pool.

28 a. Although the non-agricultural pool contends there was

1 never any delegated authority to individual members, their
2 actions refute that contention. Those actions are: having only
3 one representative execute the peace agreement on behalf of the
4 entire pool and having only one representative execute the
5 purchase and sale agreement on behalf of the entire pool.

6 b. In all of the many exhibits, declarations, and pages of
7 argument submitted to the court, there is no express delegation
8 of authority by any individual member of the non-agricultural
9 pool to sign any agreement. Therefore the court must conclude
10 that the delegation of authority exists by either informal
11 agreement or custom and practice. Part of that informal
12 agreement or custom and practice must include allowing
13 watermaster and the appropriate pool to provide written notice
14 to a single individual of the nonagricultural pool.

15 iv. The court notes that nonagricultural pool committee's argument
16 that if watermaster had given clear and unambiguous written
17 notice, the pleadings will not now constitute 100 pages, and the
18 exhibits over 1000 pages. However, the court still finds
19 compliance with the terms of the purchase and sale agreement.

20 G. The court does not find that the question of the allocation between
21 storage and recovery on the one hand and desalter replenishment on
22 the other invalidated the board's approval of the notice of intent. The
23 question for the court is whether there was notice of intent to purchase
24 provided to the nonagricultural pool, and the court has found notice
25 was provided for the reasons set forth above.
26
27

28 12. Posting the agenda on the watermaster website

1 The nonagricultural pool contends that posting the agenda on the watermaster
2 web site was also insufficient to comply with the terms of the purchase and sale
3 agreement. The court rejects this contention because the question is one of
4 providing written notice of intent to buy the nonagricultural pool water, and the
5 court finds such notice was provided for the reasons stated herein.

6 The court finds that posting the agenda on the watermaster site was an
7 additional means of providing written notice of intent to purchase nonagricultural
8 pool water pursuant to the purchase and sale agreement.

9 The court has analyzed the following contentions and found them to be
10 insufficient to refute a factual conclusion of that written notice pursuant was
11 provided under the terms of the purchase and sale agreement:

- 12 A. The very minimal and sporadic attendance of nonagricultural pool
13 members at any of the nonagricultural pool meetings.
- 14 B. As of August 2009, only about 10 members of the nonagricultural pool
15 were included on the e-mail service list.
- 16 C. The watermaster website does not provide any indication that there was
17 any significant action taken with respect to the purchase and sale
18 agreement or any special or unusual documents contained in the agenda
19 package.
- 20 D. After going through the watermaster FTP site, the watermaster website
21 link to the agenda documents refers to 18.38 MB of information which
22 results in a printed document of 130 pages of which page 43 is the
23 notice of intent.
- 24 E. The single sheet of paper lying beneath so many levels of computer
25 links is given no prominence to alert the contracting parties of its legal
26 significance
- 27 F. It is an insufficient compliance with the option requirement through a
28 single sheet of paper among 130 others, under several levels of an FTP

1 website, and considering that millions of dollars were at stake.

2 G. This notice is in the present tense. It gives a postdated effective date:
3 December 18, 2009. The court finds that the analysis of the tenses does
4 not resolve the legal question as to providing the written notice.

5 H. The presence of the agenda package on the watermaster website after
6 the meeting does not constitute constructive notice.

7 I. The August 13 agenda package was not delivered by e-mail because the
8 file was so big. Also, there was nothing to distinguish it from the
9 ordinary blitz of e-mails. It was a generic e-mail. Also only about half
10 of the 10 members of the nonagricultural pool who are entitled to
11 receive the written notice of intent to purchase were included on
12 watermaster's e-mail list in August of 2009.

13 J. The August 27 board minutes were not delivered by e-mail because the
14 file was too big.

15
16
17 13. Provide v. Deliver

18 Watermaster makes an argument with respect to the definition of "provide" as
19 far as the definition does not include "delivery." While the authority under Webster's
20 dictionary is not legal authority, the court understands and accepts the distinction.

21 Watermaster points out that the peace agreement was executed by the pool
22 representative Mr. Arbelbide on behalf of the entire pool, and that Bowcock
23 executed the purchase and sale agreement on behalf of the pool. Watermaster also
24 argues that the notice was published and made generally available for all parties in the
25 same manner that watermaster provides for meetings, court filings, water
26 transactions, etc.

27 The nonagricultural pool contends that written notice was required by the
28 peace II option agreement, and delivery of written notice by US Mail was required by

1 the judgment.

2 For reasons stated above, the court finds that written notice of intent was
3 provided pursuant to the purchase and sale agreement terms:

- 4 A. directly to Sage when he was at the August 27, 2009 watermaster board
5 meeting, and because one individual (Bowcock) signed the purchase and
6 sale agreement on behalf of the nonagricultural pool, direct notice to
7 one individual on behalf of the nonagricultural pool was sufficient; and
8 B. direct notice to one individual on behalf of the nonagricultural pool
9 with sufficient because the peace agreement was executed by the pool
10 representative Mr. Arbelbide on behalf of the entire pool, and that
11 Bowcock executed the purchase and sale agreement on behalf of the
12 pool; and
13 C. written notice was provided through the agenda package posted on the
14 watermaster web site.

15 The court also makes the findings set forth in this decision, notwithstanding
16 the arguments made by the nonagricultural pool, for the following reasons:

- 17 A. The unique circumstances of this case over the course of more than 30
18 years.
19 B. The notice pursuant to the purchase and sale agreement has a
20 qualitative difference than the notice provided regarding meetings, court
21 filings, water transactions, etc.
22 C. The notice was defined a specific provision in a specific contract with a
23 specific deadline.

24
25
26 14. The November 5, 2009, staff report

27 The nonagricultural pool committee has an extensive argument regarding the
28 staff report of November 5, 2009. The staff report is dated November 5, 2009,

1 addressed to the appropriative pool, with a subject line: "proposed plan regarding
2 disposition of water purchased from nonagricultural pool." There are 4 paragraphs
3 in the staff report.

4 The first paragraph recites some history and states that "watermaster, at the
5 direction of the appropriative pool, is to issue a notice of intent to purchase the
6 nonagricultural pool within 24 months"

7 The second paragraph identifies plan B as the attachment.

8 The third paragraph talks about watermaster holding water in trust.⁷ The
9 fourth paragraph states: "staff recommends that the appropriative pool direct
10 watermaster to issue the notice of intent to purchase prior to December 21, 2009,
11 and place the water purchased in storage pursuant to the proposed plan [B]."

12 The nonagricultural pool argues that the statements in this November 5, 2009,
13 staff report prove and confirm that the notice of intent had not been provided as of
14 November 5, 2009. The nonagricultural pool also points out that Bowcock and Sage
15 also state that watermaster counsel and members of the appropriative pool
16 confirmed publicly in the fall of 2009 that the notice of intent to purchase had not
17 been given and would not begin until a last possible date.

18 The court rejects this argument for the following reasons:

- 19 A. An interpretation by watermaster staff is not binding.
- 20 B. The court has concluded that the written notice of intent was provided
21 pursuant to the purchase and sale agreement previously.
- 22 C. The staff report cannot be a conclusion of law.
- 23 D. The particular reference to the purchase and sale agreement is
24 ambiguous with respect to whether it is a statement of current
25 intention, current status, or future conduct.
- 26 E. There is no evidence about how the staff report was prepared, who
27 prepared it, on what basis it was making any conclusions, and why the
28

⁷ This comment about holding water in trust became the subject of discussion not relevant to the motion.

1 last paragraph was inserted.

2 F. There is no evidence that the watermaster staff was conscientiously
3 monitoring the appropriative pool's actions.

4 G. The court can just as easily draw the conclusion that the last paragraph
5 was simply a repetition of previous staff reports without any reference,
6 basis, or consideration regarding actual facts.

7 H. The notice was actually approved by the board in August, but the
8 wording on the notice of intent to purchase makes its effective date
9 December 18, 2009. The statements by watermaster counsel Fife and
10 members of the appropriative pool that the notice of intent to purchase
11 would be given at the last possible date is still consistent with the
12 wording of the notice of intent.

13 I. The plan B (an alternative financing plan) is also ambiguous with
14 respect to any dates for providing the written notice of intent.

15 i. It states that the watermaster, under the direction of the
16 appropriative pool, will send notice.

17 ii. Even though it is dated November 5, the plan B specification
18 paragraphs it is unclear to the court if they ever came into
19 effect.

20
21
22 15. Non-agricultural pool's failure to object (silence)

23 The court however cannot conclude that the nonagricultural pool's silence on
24 the issue of providing notice of intent be deemed consent for the following reasons:

25 A. Based on the declarations and evidence presented, there is no
26 foundation for the court to conclude that all the members of the
27 nonagricultural pool knew there was a notice of intent document in the
28 agenda package for the August 27, 2009 board meeting. Without any

1 underlying knowledge, there is no basis for the members to object.

2 B. Although silence implies consent (*qui tacet consentire videtur*) there has to
3 be a basis for knowledge about what action about which person is
4 remaining silent. For all but Mr. Sage of the nonagricultural pool who
5 actually attended the board meeting on August 27, 2009, there is no
6 basis to conclude any of the other nonagricultural pool members
7 actually received the notice of intent.

8 i. However, as the court has found previously, the question is not
9 one of receipt, but whether the written notice of intent was
10 provided. The court has found the written notice of intent was
11 provided to the members of the nonagricultural pool

12 ii. The question of whether the notice of provided is a qualitative
13 one, not a quantitative one. The court finds that requirements of
14 the purchase and sale agreement were met.

15
16
17 16. The November 19, 2009, advisory committee and board meetings
18 Watermaster points out that at the November 19, 2009 advisory committee
19 and board meetings, the watermaster CFO gave a presentation concerning a special
20 assessment to be levied under plan B, and watermaster staff briefed the advisory
21 committee and the board about water that had Artie been purchased from the
22 nonagricultural pool. Water master staff gave out a handout showing the plan B cost
23 to each appropriate pool member. A member of the nonagricultural pool was
24 present at these presentations.

25 Even though there was only one member of the nonagricultural pool present
26 for these presentations, the court finds these presentations to be further evidence of
27 the nonagricultural pool being provided with written notice of the intent for the
28 reasons set forth above.

1 The implication of these facts is that the nonagricultural pool therefore had
2 been provided with written notice of intent, and watermaster further argues that
3 there was not any contention regarding insufficiency of the notice. This again is the
4 “silence implies consent” argument. For the reasons stated above, the court does not
5 accept this argument.⁸

6
7
8 17. Section 2.7 of the Rules and Regulations

9 The court concludes that section 2.7 of the rules and regulations does not
10 apply to the purchase and sale agreement for the following reasons:

- 11 A. Section 2.7 is substantially identical to sections 58 and 59 of the
12 judgment, and the judgment governs the administration of the three
13 pools, not how contract notices are to be provided.
14 B. By its own terms, the section only applies to notice regarding the time
15 and place of board meetings.
16 C. Even with respect to the notice of board meetings, section 2.7 requires
17 consent for facsimile or electronic mail delivery, and watermaster has
18 not provided any consent by members of the nonagricultural pool.
19 D. The court's determination whether the written notice was provided is
20 based upon contract principles and the unique facts of this case.

21
22
23 18. The judgment

24 Section 31(a) of the judgment states that “any action, decision or rule of
25 watermaster shall be deemed to have occurred or been enacted on the date on which
26

27
28 ⁸ Watermaster again suggests that whether and to what extent the nonagricultural the pool representative communicated
this report other members of the pool is a relevant subject for further discovery. The court finds no basis for this,
because communication of board approval is not relevant to the motion. The question for the court is whether written
notice of intent to purchase was provided to the nonagricultural pool.

1 written notice thereof is mailed.”

2 The court also finds that this provision of the judgment does not apply here
3 because:

4 A. The written notice of intent by watermaster on behalf of the
5 appropriative pool would not be “an action, decision, or rule” on behalf
6 of watermaster.

7 B. This provision of the judgment does not govern this type of post-
8 judgment contractual relationship between the parties.

9
10
11 19. Reasonable notice/substantial performance

12 For the reasons set forth above, the court need not reach the issues of
13 reasonable notice and substantial performance. The court finds that the
14 appropriative pool complied ¶C and ¶H of the purchase and sale agreement.

15
16
17 20. Estoppel

18 For the reasons set forth above, the court finds no basis for estoppel in this
19 matter.

20 Furthermore the purchase and sale agreement itself provides for an alternative
21 if the written notice of intent was not provided.

22
23 21. Timeliness of the motion

24 The basis of watermaster's argument that the motion is untimely is based upon
25 the August 27, 2009 notice of intent. With the effective date of December 18, 2009,
26 the court finds the motion timely.

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The court reserves any rulings regarding the role of watermaster, it is counsel, or any of the other collateral problems raised through the motion.

The court recognizes that its ruling may affect other aspects of the heavily negotiated peace II package and the millions of dollars at stake.

For the reasons set forth herein, the motion of the nonagricultural pool committee and joinder therein is denied.

Dated: June 18, 2010

STANFORD E. REICHERT

Stanford E. Reichert, Judge

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 June 18, 2010 I served the following:

1) RULING AND ORDER

☒ 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

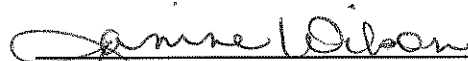
☐ BY PERSONAL SERVICE: I caused such envelope to be delivered by hand to the addressee.

☐ 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 June, 18, 2010 in Rancho Cucamonga, California.



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