

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

DEPARTMENT S-35

HONORABLE STANFORD E. REICHERT, JUDGE

CHINO BASIN MUNICIPAL WATER)
DISTRICT,)

Plaintiff,)

vs.)

Case No: RCVRS51010

CITY OF CHINO, et al.,)

Defendants.)

_____)

REPORTER'S TRANSCRIPT OF ORAL PROCEEDINGS
Friday, September 23, 2016

APPEARANCES:

For Chino Basin Watermaster: BROWNSTEIN HYATT FARBER SCHRECK
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For Cucamonga Valley Water District:	BEST BEST & KRIEGER, LLP By: PAETER E. GARCIA 300 South Grand Avenue 25th Floor Los Angeles, California 90071
For Non-Agricultural (Overlying):	HOGAN LOVELLS US, LLP By: ALLEN W. HUBSCH Attorney at Law 1999 Avenue of the Stars Suite 1400 Los Angeles, California 90067
For City of Pomona:	LAGERLOF SENEAL GOSNEY & KRUSE, LLP By: THOMAS S. BUNN III Attorney at Law 301 North Lake Avenue 10th Floor Pasadena, California 91101
For Overlying Agricultural Pool:	EGOSCUE LAW GROUP By: TRACY J. EGOSCUE Attorney at Law 3777 Long Beach Boulevard Suite 280 Long Beach, California 90807
For the State of California, by and through California Department of Corrections and Rehabilitation (Agricultural Pool):	STATE OF CALIFORNIA By: MARILYN H. LEVINE Deputy Attorney General 300 South Spring Street Suite 1700 Los Angeles, California 90013
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For City of Chino:

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ALSO PRESENT:

PETER KAVOUNAS, P.E.
General Manager for Chino Basin
Watermaster

BRIAN GEYE
Chair of the Non-Agricultural
Pool

Reported By:

HAZEL DEL CARMEN MURILLO, C.S.R.
Pro Tempore Reporter, CSR-13838

1 SAN BERNARDINO, CALIFORNIA; FRIDAY, SEPTEMBER 23, 2016

2 DEPARTMENT S-35 HONORABLE STANFORD E. REICHERT, JUDGE

3 1:30 P.M.

4 APPEARANCES:

5 By counsels **SCOTT SLATER** and **BRADLEY**
6 **HERREMA**, Attorneys at Law, for **CHINO**
7 **BASIN WATERMASTER**; By counsels, **ROBERT**
8 **E. DONLAN** and **CHRISTOPHER M. SANDERS**,
9 Attorneys at Law, for **JURUPA COMMUNITY**
10 **SERVICES DISTRICT**; By counsel **DAVID**
11 **ALADJEM**, Attorney at Law, for **WESTERN**
12 **MUNICIPAL WATER DISTRICT**; By counsel
13 **FREDERIC A. FUDACZ**, Attorney at Law, for
14 **CCG ONTARIO, LLC**; By counsel **ALLEN W.**
15 **HUBSCH**, Attorney at Law, for
16 **NON-AGRICULTURAL (OVERLYING)**; By counsel
17 **THOMAS S. BUNN III**, Attorney at Law, for
18 **CITY OF POMONA**; By counsel **TRACY J.**
19 **EGOSCUE**, Attorney at Law, for **OVERLYING**
20 **AGRICULTURAL POOL**; By counsels **MARILYN**
21 **H. LEVIN** and **CAROL A.Z. BOYD**, Deputy
22 Attorneys General, for **STATE OF**
23 **CALIFORNIA**, by and through **CALIFORNIA**
24 **DEPARTMENT OF CORRECTIONS AND**
25 **REHABILITATION (AGRICULTURAL POOL)**; By
26 counsel **JIMMY L. GUTIERREZ**, Attorney...

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1 ...at Law, for **CITY OF CHINO**; By counsel
2 **STEVEN M. KENNEDY**, Attorney at Law, for
3 **THREE VALLEYS MUNICIPAL WATER**; By
4 counsels **JEAN CIHIGOYENETCHE** and **MARTIN**
5 **CIHIGOYENETCHE** and **GREGORY D. TROSS**,
6 Attorneys at Law, for **INLAND EMPIRE**
7 **UTILITIES AGENCY**; By counsel **JOHN J.**
8 **SCHATZ**, Attorney at Law, for
9 **APPROPRIATIVE POOL COMMITTEE**; By counsel
10 **ARTHUR G. KIDMAN**, Attorney at Law, for
11 **MONTE VISTA WATER DISTRICT**.

12 ALSO PRESENT:

13 **PETER KAVOUNAS, P.E.**, General Manager of
14 Chino Basin Watermaster.
15 **BRIAN GEYE**, Chair of Non-Agricultural
16 Pool.

17 (Hazel Del Carmen Murillo, C.S.R.,
18 Pro Tempore Reporter, CSR-13838)

19 * * *

20 THE COURT: So the first thing we need to do is make sure
21 that all of the attorneys who are present today have provided
22 cards.

23 Have you all turned in business cards?

24 Okay. That's good. Okay. So let's get this show on the
25 road. Okay. So let's see. Probably the best way I'll do this
26 is let's go ahead and start with the counsel table, then.

1 Mr. Slater, why don't we lead off with you, then.

2 MR. SLATER: Scott Slater, S-l-a-t-e-r, on behalf of the
3 Chino Basin Watermaster.

4 THE COURT: Thank you.

5 And?

6 MR. HERREMA: Brad Herrema, H-e-r-r-e-m-a, on behalf of
7 Chino Basin Watermaster.

8 THE COURT: Thank you.

9 And?

10 MR. GUTIERREZ: Good morning, Your Honor.
11 Jimmy Gutierrez appearing on behalf of the City of Chino.

12 THE COURT: Okay. Bear with me just a second. Let's
13 make sure we've got everybody, mark who's here.

14 Okay. And?

15 MR. DONLAN: Robert Donlan, D-o-n-l-a-n, on behalf of
16 Jurupa Community Services District.

17 THE COURT: Thank you.

18 And I'll work the audience, and we'll go to the jury box.

19 Okay. To my far left?

20 MR. KIDMAN: Good afternoon, Your Honor. Art Kidman for
21 defendant Monte Vista Water District. I have a card right here,
22 Your Honor.

23 THE COURT: Thank you very much.

24 Okay. It's Arthur, A-r-t-h-u-r --

25 MR. KIDMAN: Nice to meet you, Your Honor.

26 THE COURT: Yes. Thanks.

1 -- K-i-d-m-a-n.

2 Next?

3 MR. KAVOUNAS: Good afternoon, Your Honor. I'm not an
4 attorney. I'm Peter Kavounas --

5 THE COURT: Mr. Kavounas, yes. Welcome.

6 MR. KAVOUNAS: -- general manager for Chino Basin
7 Watermaster.

8 THE COURT: Okay. Thank you, Mr. Kavounas. I just got
9 your card, if I can find it. There. Found it.

10 Okay. All right. And moving this way, over to the front
11 row, the attorneys on the front row here.

12 MR. SANDERS: My name is Chris Sanders, and I'm here on
13 behalf of the Jurupa Community Services District.

14 THE COURT: Okay. Thank you, Mr. Sanders. All right.
15 Here. Found it.

16 Okay. Then any attorneys -- additional attorneys on this
17 side of the courtroom? No?

18 How about on my right over here? No? Okay.

19 Let's turn over here to our jury box, and I'll work from
20 the back -- from my left to right.

21 So, sir?

22 MR. TROSS: Good afternoon, Your Honor. Greg Tross,
23 T-r-o-s-s, on behalf of Inland Empire Utilities Agency.

24 THE COURT: Okay. Give me just a moment, Mr. Tross. Do
25 we have your card?

26 THE COURT ATTENDANT: Third page, Your Honor.

1 THE COURT: Okay. Here we go. Found it. Okay. Thank
2 you.

3 And?

4 MR. MARTIN CIHIGOYENETCHE: Good afternoon, Your Honor.
5 Marti Cihigoyenetcche on behalf of Inland Empire Utilities Agency.

6 THE COURT: All right. Thank you.

7 And?

8 MR. JEAN CIHIGOYENETCHE: Good afternoon, Your Honor.
9 Jean Cihigoyenetcche on behalf of Inland Empire.

10 THE COURT: Oh, we've got the entire Cihigoyenetcche
11 family here. Welcome. I hope there's a family reunion party
12 after this hearing.

13 Next?

14 MR. GARCIA: Good afternoon, Your Honor. Paeter Garcia
15 on behalf of Cucamonga Valley Water District.

16 THE COURT: Okay. Give me one moment, Mr. Garcia. Do we
17 have your -- found it. Cucamonga. Got it.

18 Okay. And?

19 MR. ALADJEM: Good afternoon, Your Honor. David Aladjem,
20 A-l-a-d-j-e-m, on behalf of Western Municipal Water District of
21 Riverside County.

22 THE COURT: Got it. Thank you.

23 And?

24 MR. KENNEDY: Good afternoon, Your Honor. Steve Kennedy
25 on behalf of Three Valleys Municipal Water District.

26 THE COURT: Okay. Mr. Kennedy, just one moment. All

1 right. Found it. Okay. And that's the back row.

2 Yes? Front row?

3 MR. BUNN: Good afternoon, Your Honor. Thomas Bunn,
4 B-u-n-n, for City of Pomona.

5 THE COURT: Okay. Found it. Okay.

6 MS. BOYD: Good afternoon, Your Honor. Deputy Attorney
7 General Carol Boyd appearing through the State of California
8 acting by and through the California Department of Corrections
9 and Rehabilitation and other state agencies as members of the
10 Agricultural Pool.

11 THE COURT: Got it. Thank you.

12 MS. BOYD: Thank you.

13 MS. EGOSCUE: Good afternoon, Your Honor. Tracy Egoscue,
14 E-g-o-s-c-u-e, on behalf of the Ag Pool.

15 THE COURT: Thank you.

16 And?

17 MS. LEVIN: Good afternoon, Your Honor. Marilyn Levin,
18 Deputy Attorney General representing the State of California, by
19 and through the California Department of Corrections and
20 Rehabilitation as a member of the Ag Pool.

21 THE COURT: Got it. Thank you.

22 MR. FUDACZ: Good afternoon, Your Honor. Fred Fudacz,
23 F-u-d-a-c-z, on behalf of City of Ontario.

24 THE COURT: Thank you. Got it.

25 And?

26 MR. SCHATZ: Good afternoon, Your Honor. John Schatz

1 representing the Appropriative Pool Committee.

2 THE COURT: All right. Thank you, Mr. Schatz. Okay.
3 Got it.

4 Okay. I've got everybody but Mr. Hubsch.
5 Are you Mr. Hubsch?

6 MR. GEYE: Your Honor, my name is Brian Geye, and I'm
7 chair of the Non-Ag Pool. Allen is our co-counsel. I'm calling
8 him, and he hasn't come back inside yet.

9 THE COURT: Oh, okay.

10 MR. GEYE: I can go chase him down if you'd like, as long
11 as it doesn't affect anybody here.

12 THE COURT: It doesn't bother me. It's an open
13 courtroom. You can come and go. We'll just wait one moment and
14 see if we can get Mr. Hubsch here.

15 While we do that, anyone else who needs to have their
16 appearance stated for the record? No hands. It's like picking a
17 jury. No hands.

18 Okay. All right. Well, while we wait just a moment here
19 for Mr. Hubsch, I'll welcome you all to this hearing, a
20 long-awaited hearing with respect to the various motions on
21 calendar for today.

22 The Court did -- I could not wait to handle this as well.
23 But while we see if Mr. Hubsch comes in, the Court did a
24 lengthy -- the length of a bible -- tentative ruling in the
25 matter --

26 Here we go. Mr. Hubsch has now joined us.

1 Good afternoon, Mr. Hubsch.

2 MR. HUBSCH: Hi. Allen Hubsch. Sorry.

3 THE COURT: Have a seat. Thank you.

4 And did everybody get that? It's like picking a jury.
5 Anyone who didn't get that? Okay. Anyone who needed more time
6 to read it? Another week or two? No? All right. It was long.
7 So there were no hands.

8 So as I mentioned, we do have a number of motions on
9 calendar. What I would suggest doing is the shorter matters
10 first. And the shortest -- I hope the shortest of the short
11 matters will be figuring out how we should handle service and
12 filing. This was an issue raised by Mr. Hubsch a while ago, like
13 last February. And I have a suggestion to where to start. We
14 may want to go off the record to sort these things out.

15 But the suggestion is that any document, without a proof
16 of service, be filed here in the court as received and then
17 simultaneously given to Watermaster to be served and then filed
18 after the proof of service. That's my initial suggestion. But
19 I'm open to suggestions. Because when we started this process --
20 and I was slightly embarrassed and surprised to read that the
21 initial filing on this was October 23rd of 2015, 11 months ago to
22 the day -- things got a little confused.

23 So, Mr. Hubsch, you were kind of the lead on that. Did
24 you want to be heard on this issue at this time?

25 MR. HUBSCH: Well, what Your Honor suggested sounds fine
26 to me. Our primary concern is that we be able to file directly

1 with the court. And so if we can file directly with the court,
2 we are more than happy to let Watermaster serve it.

3 THE COURT: Okay. That -- good. That seems like a good
4 start, then.

5 Mr. Slater?

6 MR. SLATER: Your Honor, that's fine.

7 THE COURT: Okay. So this will be the rule from now on,
8 that if there's a document with a proof of service, just file it
9 with the court and then serve the copy on Watermaster to serve
10 with other -- to send out to other parties. I won't call it
11 "service." It will be mailing.

12 If the document doesn't have a proof of service, file it
13 directly with the court, and we'll give you a received stamp on
14 the document but the original then would go to Watermaster to get
15 the proof of service attached and then filed with the court.

16 Is that a procedure that you can live with then,
17 Mr. Hubsch?

18 MR. HUBSCH: Yes, Your Honor. That sounds perfect.

19 THE COURT: Okay. And Mr. Slater?

20 MR. SLATER: Yes, Your Honor.

21 THE COURT: Okay. Any comments, suggestions,
22 alternatives, or requests?

23 Hearing none, okay. That will be the process from now
24 on. Thank you, everybody. So that's one issue disposed of.

25 The next issue, which I believe will be shorter, is the
26 motion of the City of Chino to conduct discovery. And that was

1 part of the tentative rulings which the Court sent out. I hope
2 you got them by Tuesday. I see some nods. Mr. Cihigoyenatche is
3 nodding and general nodding in the audience, so I'm pleased you
4 got those ahead of the hearing today.

5 And the tentative is against the City of Chino. So I
6 always look to the person -- the party against whom the tentative
7 is and ask if there's additional argument.

8 Mr. Gutierrez?

9 MR. GUTIERREZ: No, Your Honor. I have no additional
10 argument, and I would submit on your ruling.

11 THE COURT: All right. Thank you.

12 Mr. Slater?

13 MR. SLATER: No, Your Honor.

14 THE COURT: All right. Thank you.

15 In that event, the draft -- the tentative order will
16 become the order. I'll go ahead and sign that today, and the
17 motion is denied. Okay? That was quick.

18 Okay. Now, before I turn to the main motion on calendar
19 today -- and that's the motion regarding the Safe Yield Reset
20 Agreement and Amendment of Restated Judgment, paragraph 6 -- is
21 there anything else we need to address before we go into the
22 merits of that motion? I don't see any other hands. Okay. I
23 think we're ready to move forward.

24 This motion in the tentative ruling was granted in part
25 and denied in part, and, in the Court's view, it was denied in
26 greater part than it was granted.

1 And so I'm going to go to you, Mr. Slater, to lead off
2 the argument.

3 MR. SLATER: Thank you, Your Honor.

4 THE COURT: You're welcome.

5 MR. SLATER: I appreciate the opportunity to address the
6 Court.

7 THE COURT: Of course.

8 MR. SLATER: Let me begin with it's sort of fortuitous
9 that just last week, Watermaster conducted a workshop with all of
10 the stakeholders to revisit the various pools and the board in
11 the construct of what is Watermaster, and it was important for us
12 to have revisited that. Because I'm here today, and -- you know,
13 on behalf of Watermaster -- and want to reaffirm that we're here
14 as your extension, in service of the Court. Watermaster has no
15 responsibility, has no authority that's separate and independent
16 from the decree, and our primary responsibility is, in service of
17 the Court, to administer that decree and to carry out the
18 Judgment and the Peace Agreement and its progeny otherwise
19 referred to as the court-approved management agreements.

20 And so we understand that you were besieged really with
21 documents. I think I counted over 500 pages in pleadings and
22 motions.

23 THE COURT: And about 1,000 in exhibits.

24 MR. SLATER: And 1,000 in exhibits.

25 Incredible burden to place on you, Your Honor. We
26 understand that, and we are very grateful for your willingness to

1 weigh through it. In the end, we stand ready to implement any
2 order in any direction that the Court wants to move forward on.

3 I think from our standpoint, we know that we are not to
4 repeat any arguments that have been briefed, and I will not do
5 that.

6 THE COURT: That was not an order. It was an
7 admonishment and request. And, again, the reason was, as I put
8 in the cover -- and I can't tell you the number of hours that I
9 spent going over these. Maybe you can see from the stacks here
10 and the notations that I've got, the detail in which I went
11 through all of the paperwork. And so my suggestion was that
12 you -- an admonishment was that you not repeat. Because having
13 read it, read it, read it, read it -- I sound like a rabbit --
14 read it, and reread it --

15 MR. SLATER: I think that is a rabbit.

16 THE COURT: Yeah. Read it, read it, and read it and
17 thought about it, thought about it, thought about it, thought
18 about it -- it was not likely that a repetition was going to be
19 persuasive, and so that's why I set forth that admonishment.

20 MR. SLATER: So I -- in recognition of that, we too read
21 the 63 pages and the companion orders or companion rulings. So
22 we were going to do our level best not to repeat anything.

23 THE COURT: Okay. Thank you.

24 MR. SLATER: All right. So, again, in the context of
25 service, trying to present to you the underlying circumstances,
26 we wish to go through some context, some documents that may be of

1 interest to the Court and pertinent to the tentative so that you
2 appreciate the full context in which some of these agreements
3 have been reached.

4 We think it is in our best interest and in the Court's
5 best interest that you are fully apprised of everything so that
6 you're not mad at us later, frankly. If you're the king, we
7 assume that we will not be beheaded for failing to bring things
8 to your attention.

9 THE COURT: That's why we're here.

10 MR. SLATER: Exactly. And then, Your Honor, there's just
11 a pragmatic point of we are going to have to implement what it is
12 that's contained in the tentative ruling once it becomes final.
13 And I think, you know, as I was getting ready to come over here
14 today, I was sitting in an office that's there at Watermaster,
15 and there's a wall full of reports and pleadings all pertinent to
16 this. And it is Byzantine, it is arcane, but it is important.
17 And if you will allow me, Your Honor, to take a couple of minutes
18 to build up on context on how we got here?

19 THE COURT: Of course. Take your time, really.

20 MR. SLATER: So I'll start with this: I was a baseball
21 fan when I grew up, and there were certain numbers that were
22 sacred to me -- 61; 2,130; 56. But when I got to Watermaster, I
23 found out that indeed there were sacred numbers at Watermaster
24 and that these numbers were really important. In fact, I learned
25 that within my first week of representing Watermaster in February
26 of 2000 -- February of 2000, 17 years ago, that these numbers

1 were so sacred that within 30 minutes of my first appearance at a
2 Watermaster board meeting, a motion was made to fire me because I
3 had become prejudiced and didn't understand.

4 Now, the motion didn't get a second. And thankfully,
5 because of some of the people in this room, they said to give me
6 a chance. But these numbers are important, and we're going to
7 come back to them over and over again. They are sacred, they are
8 inviolate, and they have a lot to do with the parties' rights and
9 responsibilities.

10 THE COURT: Okay. Just for the record, the numbers you
11 put up on the overhead were the --

12 MR. SLATER: 140- is the equivalent to what the initial
13 Safe Yield was.

14 THE COURT: Right. That's 140,000 acre-feet per year.

15 MR. SLATER: Plus 82,800 acre-feet, otherwise 82,8- for
16 the Ag Pool, which cannot be reduced under the decree or any of
17 the court management agreements for any reason. 82,8- for the
18 Ag Pool.

19 THE COURT: And that's actually the five-year average as
20 described in the Judgment --

21 MR. SLATER: There were --

22 THE COURT: -- the number divided by five.

23 MR. SLATER: -- excursions, yes.

24 THE COURT: Okay.

25 MR. SLATER: Some flexibility.

26 There was also an allocation for the Non-Ag Pool, those

1 industrial overlying landowners of 7,366. And then the residual
2 balance was made available to the Appropriative Pool, which was
3 extensively the cities and districts that people engaged in
4 providing water for human consumption, domestic use, municipal
5 and industrial use at 49,834. And then there was an additional
6 5,000 acre-feet, which was designated not a Safe Yield, but as --
7 what? -- as controlled overdraft. Because when the Judgment was
8 set up in 1978, it set aside 5,000 acre-feet on a projected basis
9 as controlled overdraft.

10 THE COURT: And the plan to that was to use hydraulic
11 control, wasn't it?

12 MR. SLATER: No.

13 THE COURT: Not that time?

14 MR. SLATER: No, Your Honor. In fact, in my preparation
15 to come to work at Watermaster after I've been hired, I read a
16 book. And the book was called "*Dividing the Waters*." It is a
17 fabulous book. It was written by the former dean of
18 Indiana University, a gentleman named William Blomquist. He's
19 now teaching at Stanford as part of the Hoover Institute program,
20 and he called Watermaster sort of -- the Chino Basin Water an
21 amazing accomplishment because it wasn't a traditional
22 Watermaster or court adjudication, in his experience. It was
23 what he called a polycentric form of governance, where governance
24 was shared among the various constituencies and together, through
25 their promotion of their own individual interest, a higher
26 purpose could be achieved.

1 So in the beginning when I joined Watermaster, it had
2 sort of a, let's just say, below-average reputation --
3 below-average reputation as reflected in the reviews from
4 Judge Gunn, who was then there, and that had a lot to do with the
5 fact that it was very contentious. Watermaster hadn't really
6 done anything more than -- than function as a traffic cop,
7 adjudicating individual disputes that may occur from time to
8 time. And ultimately there had been a replacement of the former
9 Watermaster, which was now the Inland Empire Utilities Agency,
10 formerly the Chino Basin Municipal Water District.

11 There was no hydraulic control. In fact, there was no
12 big plan. There was no big vision. It was business as usual.
13 But in connection with the replacement of the Chino Basin
14 Municipal Water District as Watermaster with the nine-member
15 board, Judge Gunn had a higher plan, and he enlisted the support
16 of two experts: One, Rob Donlan's former partner,
17 Anne Schneider, a brilliant woman, scholar in groundwater issues.

18 In fact, she had written something called *The Special*
19 *Problem Section for Groundwater* at the governor's request in
20 1978. It's a published paper. She'd done a lot of groundwater
21 work, and Judge Gunn brought her in, the special assistant to the
22 Court. And she brought along with her a gentleman named
23 Joe Scalmanini. Many of us knew him as "sidekick," which sort of
24 chased Joe. Because seriously, Your Honor, he was an iconic
25 engineer, and to be called "sidekick" was a little tough for Joe
26 at any point, but a real contributor.

1 So the two of them, along with inspiration from
2 Judge Gunn, worked with Watermaster to develop something --
3 before I got here -- something called an "Optimum Basin
4 Management Plan."

5 And why did they do that? They did that because, as
6 special referee Schneider pointed out, since 1978, under
7 paragraph 41 of the Judgment, Watermaster had never done that.
8 It was a case of either nonfeasance or malfeasance. And as
9 Watermaster's consultant, Mark Wildermuth -- in collaboration
10 with Joe and support from the judge -- pointed out, there was a
11 travesty occurring in the basin. And that travesty was a
12 downward loss of yield and degradation of water quality in the
13 southwesterly portion of the basin. It was salting up, high
14 salinity and becoming unusable without -- without desalting.

15 So I joined in February or March of 2000. And what was
16 on our plate was -- you know, Judge Gunn was sort of a master, if
17 you will, of carrot and stick. And what he said was, "We want
18 you to do this. We're encouraging you to do this. We want to
19 give you the tools to do this. But if you don't get it done by
20 June of 2000, I'm sending Watermaster's responsibilities off to
21 the Department of Water Resources. You're done, nine-member
22 board. You've had your chance. You failed."

23 So in the very first effort for the Watermaster family to
24 try to undertake a collaborative exercise, the Watermaster
25 adopted an Optimum Basin Management Program, OBMP. They adopted
26 that program with aspirations for storage by as much as a million

1 acre-feet perhaps over time for expanded usage of recycled water.
2 But the cornerstone from the judge's standpoint was one thing,
3 make no mistake about it. The judge wanted 40- MGD, 40 million
4 gallons a day of desalting capacity, and he wanted it now.
5 Because he was afraid that, as the conditions continued to grade
6 in the southwesterly portion of the basin, that long-term
7 Safe Yield would decline, that portions of the basin would become
8 unusable, and the community -- the billion-dollar economy, that's
9 the Inland Empire, would suffer.

10 So Watermaster did something that it had never done
11 before. It had this Herculean obligation, estimated a couple of
12 hundred million dollars, and at that point it turned out to be,
13 you know, closer to half a billion. So there was this
14 obligation. And how do you encourage all of these communities to
15 come together and agree on a plan to do that?

16 So for the first time the question was, "What do we have
17 to do? What do you need? What insurances do you need, the
18 broader community, in order to embark on this enterprise?" And
19 that became the Peace Agreement, which is a series of agreements
20 bound together under one document called "Peace Agreement."

21 It set aside or it counted for various forms of conduct
22 that the parties were going to ask from each other. It was, in
23 effect, Your Honor, the master plan. It was the master plan for
24 at least 30 years. Think about that. 2000, a basin which had no
25 plan at all five years before was now on a trajectory for
26 managing the basin for the next 30 years. So the agreement was

1 there and the attachment to it was this OBMP implementation plan.
2 And that implementation plan provided for something called "the
3 desalters."

4 Now, it's true that some desalters had already started up
5 to about 9- MGD and were already underway. But here is the
6 problem, Your Honor, there wasn't any water that could be pumped
7 from this basin to go into those desalters. The yield was spoken
8 for. So the desalters could be located, but somebody had to
9 figure out a way to take some water from this 140,000 acre-feet
10 and make it available to those desalters, or there wasn't going
11 to be the OBMP.

12 There's a financial cost to constructing the operation,
13 and there's a financial cost associated with it. And if there
14 wasn't water, Your Honor, that was available from the basin, the
15 obligation returned to those -- presumably to those parties who
16 received the water to assume a replenishment assessment. So what
17 that means, in practical terms, is a zero-sum game. What goes
18 in, comes out. No more. So Watermaster, the parties'
19 predecessor, would be obliged to go to the Metropolitan Water
20 District through IEUA or perhaps Western or someone else, buy
21 water from the Metropolitan Water District, send it to IEUA, and
22 deliver it to offset that additional production.

23 So this is why, back in the original Peace Agreement,
24 there is a provision in 7.3, which explains where the water was
25 going to come from. It's on page 46 and 47 of the original
26 Peace Agreement, 7.5, and it creates really a waterfall of

1 responsibility or opportunity, if you look at it that way. It
2 depends on whether you're an optimist or pessimist, I guess. And
3 here it is.

4 THE COURT: Yes, I have it. Yes.

5 MR. SLATER: And notes -- okay. So there's, first, the
6 25,000 acre-feet --

7 THE COURT: Let me just stop you there for a second.
8 Just for the record, it is paragraph 7.5, of Peace I.

9 And go ahead, please.

10 MR. SLATER: So it sets forth a cascading call to fulfill
11 that requirement. First, there was 25,000 acre-feet of water
12 that came pursuant to an agreement with Kaiser. And then here is
13 that term that we're going to see from 2000 until 2017, the term
14 "New Yield of the Basin," New Yield of the Basin.

15 THE COURT: So let me stop you. So the first time we
16 encountered the concept of New Yield is in Peace I from the year
17 2000?

18 MR. SLATER: Correct, Your Honor.

19 THE COURT: All right.

20 MR. SLATER: And then it moves through -- the next is --
21 it's "Safe Yield of the Basin." And then last -- do you
22 understand as well, Your Honor, sometimes we could tighten things
23 down. And sometimes we had to leave things for further
24 resolution because we weren't necessarily going to be able to get
25 an agreement on a hundred percent of the things. So paragraph
26 (d) says, "Additional Replenishment, water purchased by

1 Watermaster, the cost of which shall be levied as an assessment
2 by Watermaster."

3 Now what is vague about that, Your Honor, is on who?

4 THE COURT: Okay. So when you say subsection (d),
5 talking about "Additional Replenishment, water purchased by
6 Watermaster" -- but then what that means is Watermaster has to
7 turn to the members of the Appropriative Pool to reimburse you,
8 essentially?

9 MR. SLATER: Well, and I would say that on behalf of some
10 of the stakeholders who might otherwise jump up and raise their
11 hand, Your Honor, they would say, "Not so fast, General Counsel."
12 Because there are other pools involved too, and everybody was
13 benefitting from this provision, so there was some art in the
14 vagueness --

15 THE COURT: Okay.

16 MR. SLATER: -- leading to a further determination of
17 what that assessment would look like.

18 So this is -- you know, this is the first time that the
19 notion of New Yield comes up in -- you know, Ms. Schneider was
20 very thorough, probably never been a more thorough lawyer, in my
21 experience, and she was the special referee. And while we were
22 going through all of this, she was asking questions, and there
23 are lengthy special referee reports that existed at the time the
24 Peace Agreement was approved. And, you know, it was one of those
25 things where you don't want to do it and your client is not
26 particularly happy about it, but these post-judgment

1 communications -- Anne would always insist on that.

2 Because, as we're going to talk about with regard to your
3 63-page ruling, that's going to need to be preserved for
4 posterity. There are going to be people 20 years from now
5 wanting to know what exactly is met. So Anne's resolution was,
6 "Anytime there's something that's ambiguous, I'm going to ask you
7 a question, you're going to have to answer it, and we're going to
8 lodge it," just like Don Stark (phonetic) had done in 1978 when
9 the original decree was lodged, that it will be a contemporaneous
10 communication about why; right?

11 THE COURT: Okay.

12 MR. SLATER: So -- so, Your Honor, again, and the walls
13 and walls of paper -- right? -- and getting ready for today just
14 trying to make sure -- I'm going to pop this on here -- gives
15 a -- this was written by Watermaster general counsel to
16 Judge Gunn, on October 26th, 2000, at the recommendation of the
17 special referee to discuss what it is we were doing with regard
18 to this concept of New Yield. Because she was unsatisfied that
19 the briefing had described it in sufficient detail. I could put
20 it up here, but I think -- I'm just going to describe it.
21 Your Honor can look at it at your convenience.

22 THE COURT: Is it in the paperwork somewhere?

23 MR. SLATER: You have it, Your Honor. We'll make it
24 available. We'll lodge it with you, if you'd like.

25 THE COURT: Okay. Was it so far a part of the motion?

26 MR. SLATER: We had not filed it.

1 THE COURT: Okay. That's what I needed to know.

2 MR. DONLAN: Filed it with your supplemental briefing.

3 THE COURT: Okay. Thank you.

4 MR. SLATER: Thank you.

5 THE COURT: All right. Thank you, everybody.

6 Mr. Slater?

7 MR. SLATER: And on page -- let's see. What is this?

8 Page 12 --

9 THE COURT: The Post-Order Memorandum?

10 MR. SLATER: Yes. The Post-Order Memorandum on page 12.

11 THE COURT: Okay.

12 MR. SLATER: I think that the point is, Your Honor, what
13 I'd like is -- is that, again, the parties embarking on an
14 enterprise here were aspirational. They had some aspirational
15 goals. They believed that they were going to be able to manage
16 the basin more aggressively; better, better mousetrap, better
17 than had been done in the past. And the result of these
18 management activities were going to create water from programs
19 that didn't exist previously.

20 So an example would be stormwater. We're going to make
21 capital improvements in doing something to improve the quality of
22 water that's percolated in the basin, but for activity, that
23 additional water would not be available. But there was -- there
24 was an intention to be conservative, and there were people who
25 believed at the same time -- I believe this is reflected in the
26 paperwork as well -- that you shouldn't immediately adjust a

1 Safe Yield to account for that improvement until it has a track
2 record.

3 So the initial vision of New Yield as it began was it was
4 a transitory concept. It was a limbo or a holding station for
5 water that was not tried and proven to the point it could be
6 called Safe Yield. And we didn't want to leave a decade or more
7 of that water not counting. So if I'm making a -- a real
8 example: I make a 10-million-dollar investment, and it's
9 generating 1,000 acre-feet of new water every year. I don't want
10 to wait ten years before I can pump it. So we argue to the
11 Court, and the Court agreed that if it was a proven increase
12 attributable to a program, that it would qualify as New Yield.

13 And there are only two examples that I have scoured the
14 record and been able to find that have articulated the
15 intentionally created New Yield: One is stormwater, and the
16 second is induced recharge attributable to the desalters. Okay?

17 THE COURT: Okay.

18 MR. SLATER: So now --

19 THE COURT: I'm with you now, still with you.

20 MR. SLATER: Okay. So here we go now. Now, we're going
21 now, and we're on to --

22 THE COURT: Let me just stop you there. Let me make sure
23 I understand the concept of the induced recharge. As I
24 understand it, it is Santa Ana River underflow; is that correct?

25 MR. SLATER: That's correct.

26 THE COURT: Okay. It's more than that?

1 MR. SLATER: It's Santa Ana River underflow that would
2 not have showed up in the basin but for the Watermaster program
3 to make it come in.

4 THE COURT: Right. And that's lowering the water table
5 through the desalters.

6 MR. SLATER: So we only know what we know in 2000,
7 Your Honor. So I'm going to say to you if you look at what was
8 written in 2000 as opposed to what was written in 2007, they are
9 different. What's written in 2000 is -- remember, we don't have
10 40- MGD. There's no hydraulic control yet. This has not yet
11 been hatched in Mr. Wildermuth and Mr. Scalmanini's head.

12 If you took Mark out for a beer, he'd say, "Well, you
13 know, maybe somewhere up there I thought about it." But there's
14 no documentation to every suggestion anybody thought about, the
15 dramatic program that would become Basin Re-Operation in
16 hydraulic control.

17 THE COURT: Okay. And Re-Operation, again, it includes
18 induced recharge?

19 MR. SLATER: It does. That's in 2007. I'm coming there
20 next --

21 THE COURT: Okay.

22 MR. SLATER: -- okay?

23 THE COURT: I'm jumping ahead.

24 MR. SLATER: So in 2000, the expectation for how much
25 water this was going to be was, let's just say, more nominal, not
26 robust. Qualitatively, it might add. We didn't know how much.

1 We were going to find out.

2 So now we come back, and there are other things going on
3 to which I'll return to later. But during this period of time,
4 here is what Judge Gunn wanted. He wanted 40- MGD; right? He
5 felt you've got to have 40- MGD. "Now, you guys, you only did
6 30-. You only promised 30- in Peace I. But I've got a hook on
7 you. I've got my leash, and you've got to come back to me and
8 tell me how you're going to do the rest of it."

9 THE COURT: If I could stop you for a moment.

10 MR. SLATER: Yeah.

11 THE COURT: Was there something in Mr. Wildermuth's or
12 Ms. Schneider's or Mr. Scalmanini's calculations or projections
13 that made 40 million gallons per day a target figure for
14 Judge Gunn?

15 MR. SLATER: Yes, sir.

16 THE COURT: Okay. That's all I really needed to know.

17 MR. SLATER: Yes, sir.

18 And so there was an actual set-aside in Peace I, which
19 said, you know, "Okay. You're all right now, but we have you.
20 And at some point, you're going to have to come back and deal
21 with the balance."

22 THE COURT: The balance of?

23 MR. SLATER: The difference between 30- and 40-.

24 THE COURT: Okay.

25 MR. SLATER: And I want to say there was never, in the
26 party's mind -- to distinguish from Watermaster; right?

1 THE COURT: Right.

2 MR. SLATER: In the party's mind, there was never a
3 commitment per se to do 40- because they couldn't figure out how
4 they were going to pay for it. There was a notion of, "We know
5 there's this aspirational target, but we're not signed up to pay
6 for it yet, nor do we believe we have the capacity to pay for
7 it."

8 THE COURT: Meaning the funding?

9 MR. SLATER: The funding. 235 million dollars came into
10 a pot in 2000. That was one of the conditions to allowing
11 Peace I to go. So it was authorized by legislation, some magical
12 people. And work was done over at SAWPA, and the money showed
13 up. It funded the first round of the desalters, and away we go.

14 THE COURT: Southwest -- I can't remember some of the
15 acronyms.

16 MR. SLATER: The Santa Ana Watershed Protection
17 Authority, SAWPA.

18 THE COURT: Thank you.

19 MR. SLATER: So now we have something else that happens.
20 Mr. Wildermuth, mindful of the constitutional obligation,
21 Article X, Section (2) saying, "Maximize the use of water." In
22 coordination with the Inland Empire Utilities Agency, they see a
23 really significant opportunity to put recycled water to
24 beneficial use inside this basin. And there's an impediment
25 to do that, Your Honor. That impediment is called the
26 Regional Board, and not in the sense that they were bad. It's

1 just that they had standards, what are called "non-degradation
2 standards." They didn't want poor quality water dribbling out
3 from the Chino Basin into the Santa Ana River and degrading the
4 quality of water in the river.

5 So Mr. Wildermuth, with the support of IEUA and many
6 others, approached the Regional Board, and the next big idea was
7 something called "Max Benefit." And Max Benefit had an
8 articulated objective of curtailing the outflow from the
9 Chino Basin to the Santa Ana River.

10 THE COURT: Although Max Benefit -- I mean the concept
11 exists in Peace I. That sounds like Max Benefit and Hydrologic
12 Control are similar concepts.

13 MR. SLATER: Well, Max Benefit, as a program, there
14 was -- it did not exist in the Regional Board's mind. There was
15 no approval of a program in 2000. In fact, you -- and, again,
16 getting into the weeds, Your Honor, there was actually an
17 expectation there might be something like a cap-and-trade program
18 for desalting so that the people who operated the desalters could
19 have credits and trade those credits.

20 And if you look back into the documents, you'll see that
21 that was actually amended. So my point is no Max Benefit. I
22 think Max Benefit was around 2003 -- 2003.

23 THE COURT: Okay.

24 MR. SLATER: So --

25 THE COURT: And this was a Regional Board idea or
26 response?

1 MR. SLATER: It was Watermaster/IEUA initiated idea --

2 THE COURT: Okay.

3 MR. SLATER: -- to do what? To expand the distribution
4 of recycled water within the basin.

5 THE COURT: Okay. And it's IUE?

6 MR. SLATER: The Inland Empire Utilities Agency.

7 THE COURT: IEUA.

8 MR. SLATER: Acronym, IEUA.

9 THE COURT: Thank you.

10 MR. SLATER: So Max Benefit, then, in order for this
11 program to work, in order to distribute recycled water
12 pervasively through the boundaries of Watermaster, we needed to
13 achieve something. And what did we need to achieve? We needed
14 to achieve curtailment and elimination of outflow from the basin
15 into the Santa Ana River. The Regional Board demanded it.
16 Orange County demanded it because they are downgradient. So this
17 was our objective.

18 So Watermaster, in connection with trying to merge two
19 objectives, began the process of evaluating how they could
20 reoperate the basin. And Re-Operation of the basin was a
21 technique or a strategy to produce 400,000 acre-feet of water,
22 more than would be recharged into the basin. So remember --

23 THE COURT: And that's yearly?

24 MR. SLATER: No.

25 THE COURT: One time?

26 MR. SLATER: Over a 20-year period.

1 THE COURT: Okay.

2 MR. SLATER: So remember, there's no production from the
3 basin unless it has a right or it's replenished. And now we're
4 doing, Your Honor, 40- MGD, roughly equivalent to 40,000
5 acre-feet over; right?

6 THE COURT: Tell me that again.

7 MR. SLATER: Okay. So the objective -- right? -- the
8 original objective, 40- MGD. We did 30-, and now we have to do
9 an additional 10- in 2007.

10 THE COURT: Right.

11 MR. SLATER: And to do 40- -- produce 40,000 acre-feet,
12 it's not accounted for here. There's no water for it --

13 THE COURT: Right.

14 MR. SLATER: -- right? So it's going to have to come
15 from somewhere.

16 THE COURT: I'm with you.

17 MR. SLATER: Okay. So to implement Max Benefit, the
18 strategy was, secure hydraulic control, which means nothing more
19 than stop the outflow and demonstrate that you actually have sort
20 of a mark described as -- once as a picket fence.

21 You have a picket fence beneath the ground capturing or
22 intercepting the water before it hits the Santa Ana River. So we
23 had an original round of financing that made the first 30- MGD of
24 desalting capacity possible.

25 THE COURT: And that was the CDA?

26 MR. SLATER: Ultimately became the CDA, Your Honor.

1 THE COURT: Okay.

2 MR. SLATER: But now we've got a second round we have
3 to do, an additional 10- MGD, and nobody is handing out money.
4 And nobody is stepping up and saying in particular that they want
5 water. So Peace II had to create -- just like we did in Peace I.
6 We said, "What's the objective? What do we need to do in order
7 to enable it? Here is the objective. What do we need to do to
8 enable it?" What we needed to do was Peace I and the OBMP, and
9 then, voila, 30- MGD.

10 Now we have the second increment. "How are we going to
11 put this in place?" And that is why Peace II comes about.
12 Peace II is a number of commercial and management arrangements to
13 enable this second round of desalting.

14 THE COURT: Okay.

15 MR. SLATER: And interestingly enough, the Western
16 Municipal Water District, who's a key partner in that process,
17 has no water rights. They don't own any of that 140,000
18 acre-feet. And if they -- and we were having a very -- the
19 record will reflect we were having a very difficult time finding
20 anybody to come in and operate that facility.

21 THE COURT: Operate the additional desalter capacity?

22 MR. SLATER: Yes. Correct. The additional 10-.

23 THE COURT: Okay.

24 MR. SLATER: And so as the Peace Agreement is initially
25 presented, it contemplates Western's entry into the scene to be
26 the party who pushes forward on the desalters. And this becomes

1 important, Your Honor, because there are -- we have to go back to
2 the notion of the water budget. Where is the water going to come
3 from; right? Where is the water going to come from? And we know
4 a couple of things: We know that, because there was going to be
5 dewatering of the basin, there was going to be 400,000 acre-feet
6 that was made available. That comes initially from the Peace II
7 agreement --

8 THE COURT: And let me just stop you again. I'm sorry to
9 disturb your train of thought. But the Re-Operation means
10 essentially an overdraft of 400,000 acre-feet?

11 MR. SLATER: Correct.

12 THE COURT: Over the 20 years?

13 MR. SLATER: Correct. Judge Gunn, special referee,
14 insisted that there be a judgment amendment. And so Exhibit I to
15 the Judgment is amended.

16 THE COURT: Okay. If you wouldn't mind giving me -- this
17 may sound like I ought to know, but I don't. Why do they use the
18 word "Re-Operation"? I had trouble coming up with why that word
19 got used.

20 MR. SLATER: Mr. Wildermuth was probably the first person
21 that spouted that, and it just sort of took off on a life of its
22 own. We tried to define it, Your Honor. And so Mark is a
23 scientist, and so we started with the word, and then we defined
24 it. So it's defined in the Peace Agreement, and it's defined in
25 the Judgment.

26 THE COURT: All right. Thanks.

1 MR. SLATER: And it means 400 acre-feet.

2 THE COURT: Overdraft over 20 years?

3 MR. SLATER: Overdraft, absolutely.

4 THE COURT: Okay.

5 MR. SLATER: So when we go back to this -- right? --
6 it's not coming from any of that.

7 THE COURT: Right. Not the initial 140,000 --

8 MR. SLATER: So here is where it comes in. There's
9 400,000 now. Okay?

10 THE COURT: Okay.

11 MR. SLATER: And that's also controlled overdraft. And
12 Watermaster, though, along with the Court, wanted to make sure of
13 a couple of things: We had Western, who's coming forward now for
14 the first time, and it was going to put its shoulder into this
15 project. So when we went to see Judge Gunn in 2007, what
16 Judge Gunn and the referee had asked for was, "Show us your
17 schedule. How are you going to use that 400-, and how are you
18 going to use that in a way that furthers the objective? We don't
19 want it all taken out tomorrow because how do we know that you'll
20 achieve your objective? We want it" -- it's basically -- "want
21 to ransom it, hold it until you complete it. Now, you,
22 Watermaster, can have some discretion."

23 Now, if you look at 7.3 of the Peace II Agreement --

24 THE COURT: Okay. Hang on a second.

25 MR. SLATER: Here it is, Your Honor.

26 THE COURT: 7.2 of the Peace Agreement, Article VII,

1 Yield Accounting?

2 MR. SLATER: Yeah, 7.2(e), Your Honor.

3 THE COURT: Apportionment of Controlled Overdraft,
4 subsection (e). Got it.

5 MR. SLATER: Okay. What that's doing there, Your Honor,
6 is it's trying to balance equities. What this is doing is saying
7 Watermaster -- it doesn't say the parties, Your Honor. It says
8 Watermaster is going to have discretion on a schedule for how
9 this 400,000 is going to be pulled out over a 20-year period;
10 right? Because we've got objectives. We got to make sure we're
11 going to hit hydraulic control. And our producers, for going
12 forward in taking that initiative, we had to maintain control to
13 ensure that the project objectives were achieved.

14 So hydraulic control, the 400,000 acre-feet associated
15 with Re-Operation, isn't for everybody. It's for a discrete
16 specific purpose. The Monte Vista Water District, who's not a
17 party of the CDA, it's not a party to this enterprise -- it could
18 not pump that water. The only way that that 400,000 could be
19 used was in connection with the operation of the expanded and
20 initial desalters.

21 So there's 400,000 acre-feet set aside for that purpose,
22 and the Court asked for a schedule. But, Your Honor, if you look
23 at paragraph (e), romanette (ii) -- actually, you can even look
24 at (e). The last sentence of (e) is talking about Watermaster
25 ramping up, ramping down -- you know, creating a stew, cooking,
26 figuring out what's the best way to do this. And in paragraph

1 (e), romanette (ii), it leaves open the prospect that that
2 initial schedule could be modified.

3 THE COURT: Okay.

4 MR. SLATER: Right?

5 THE COURT: Right.

6 MR. SLATER: I'm sorry, Your Honor.

7 THE COURT: While you're looking for that, maybe you can
8 answer a question for me.

9 MR. SLATER: Yes, sir.

10 THE COURT: The 400,000 acre-feet overdraft is to be used
11 only for the desalters?

12 MR. SLATER: Yes, sir.

13 THE COURT: Does that mean it can be used only for
14 desalter replenishment?

15 MR. SLATER: Yes. Yes.

16 THE COURT: Okay.

17 MR. SLATER: A definition -- we can go to the definitions
18 and we can look them up if you'd like, but I think you can take
19 it on faith that basically we refer to production of groundwater.

20 THE COURT: Right.

21 MR. SLATER: Anybody who's taking water out of the basin
22 is called "production." It's a defined term, which means "pump"
23 or "extract."

24 THE COURT: Right.

25 MR. SLATER: Okay. So the desalters have to pump or
26 extract 40,000 acre-feet to meet Judge Gunn's objective --

1 THE COURT: Okay.

2 MR. SLATER: -- right? So now what Watermaster does is
3 it says, "Here is our initial table." So this is Table 3, which
4 was the initial table filed -- initial schedule filed with the
5 Court after the 2007 hearing. The Court said, "Tell us what the
6 table is." You know? "Tell us how you're going to do it." And
7 in this table, by the way, is the one we're trying to substitute
8 now.

9 THE COURT: Okay.

10 MR. SLATER: Okay?

11 THE COURT: I've seen so many tables. Is this in the
12 paperwork somewhere?

13 MR. SLATER: Yes, it is.

14 THE COURT: Can you tell me where it is?

15 MR. SLATER: Brad?

16 MR. HERREMA: It's attached to the Court's approval of
17 Condition Subsequent 7 -- I'm sorry -- Watermaster's compliance
18 with Condition Subsequent 7, which is an exhibit. I believe it's
19 Exhibit 7 to Watermaster's filing from April 1st.

20 THE COURT: Okay.

21 MR. SLATER: Isn't it great how he does that?

22 THE COURT: Amazing.

23 Yes, I see that. It is -- yes, that was filed April 1st,
24 and I see Exhibit 7. And let me make sure I can find it.

25 MR. SLATER: So --

26 THE COURT: Give me one minute.

1 MR. SLATER: Sure.

2 (Pause in proceedings.)

3 THE COURT: Yes. Yes, I see. I have it here, and it is
4 Table 3, and it is in Exhibit 7 to your filing on April 1st.
5 Okay. Thank you.

6 MR. SLATER: Okay. So, Your Honor, if you look along the
7 top bar, basically what this purports -- this Table 3, called
8 "Initial Corrected Schedule Updated to Show Desalter
9 Replenishment Accounting..." --

10 THE COURT: Slow down just a tad for my court reporter.
11 (Court confers with reporter.)

12 THE COURT: "Initial Corrected Schedule Updated to Show
13 Desalter Replenishment Accounting and Santa Ana River Inflow from
14 2001 through 2029/2030 Shortfall Deducted from Non-WMWD,
15 Western Municipal Water District, Re-Operation Account."

16 MR. SLATER: Thank you.

17 THE COURT: Okay.

18 MR. SLATER: If you're looking along the top of the
19 table, Your Honor, it purports to categorize pumping from the
20 desalter and then explain where the water is coming from.

21 THE COURT: Okay.

22 MR. SLATER: Right? So if you remember when I went
23 through the Peace I cascading priorities where the water was
24 going to come from, well, when we got to the Peace II -- I'm
25 going to come back to that in a second. We got to Peace II. We
26 modified that cascading elements to tie up some loose ends and

1 account for Re-Operation. And this is the schedule that reflects
2 how that 400- was to be used, and it's apportioning the water.
3 And it says -- in the middle it says, "Replenishment allocation
4 for Desalter III." And next to it, it says, "Replenishment
5 allocation to CDA," remembering, Your Honor, that Western is not
6 in CDA in 2007. They are not a member yet. They're on the
7 outside. They hold no production rights in the basin.

8 Watermaster and the Court wants to preserve the integrity
9 of their investment and to ensure that there's enough water to
10 cover their investment. 10- MGD, 10,000 acre-feet. The dead
11 middle column, Your Honor.

12 THE COURT: Okay. So that replenishment allocation for
13 Desalter III, that's the additional 10 million gallons per day
14 that Judge Gunn wanted to achieve to come up to the 40,000?

15 MR. SLATER: You got it, Your Honor.

16 THE COURT: Okay.

17 MR. SLATER: So this was the schedule. Now --

18 THE COURT: Every time I've tried to get figures to add
19 up, I've had trouble getting them to add up. That's why there
20 were so many tables in my proposed order. I see the 10,000. Is
21 there a --

22 MR. SLATER: Yes, sir.

23 THE COURT: Is that here?

24 MR. SLATER: Yes. So if you take those two columns side
25 by side, the one on the bottom that says "175-" and the one next
26 to it that says "225-," that's 400-.

1 THE COURT: That's 400-. Thank you. Okay.

2 MR. SLATER: That's Re-Operation water. It's split into
3 segments to protect the investment being made by Western and to
4 account for the historical contribution by the original desalter
5 parts.

6 THE COURT: Okay. Got it.

7 MR. SLATER: But what's also of interest here, Your
8 Honor, is that if you look at the categories -- if you move over,
9 you'll see projections of what is expected to be contributed. By
10 what? New Yield. New Yield is being projected to constitute
11 some of the water that will be produced by the desalters under
12 that schedule.

13 This is what Watermaster is predicting to the Court
14 based on best available information, remembering, of course, that
15 Watermaster has discretion to revise the schedule, if
16 appropriate.

17 THE COURT: Okay. And this table was prepared in --

18 MR. SLATER: It was prepared -- I believe it was filed in
19 2008.

20 THE COURT: Okay.

21 MR. SLATER: It was required by the 2007 order.

22 THE COURT: Okay.

23 MR. SLATER: And filed in 2008.

24 THE COURT: Got it. Thank you.

25 MR. SLATER: So then, Your Honor, parties go forward.

26 We're continuing to make progress towards implementing this --

1 what I think is the second Herculean effort -- to do the next
2 round of desalting. And along the way, Western makes peace --
3 pardon the repeated use of that term -- but makes peace with the
4 members of the CDA along with the City of Ontario and Jurupa
5 Community Services District. They all join together into the
6 CDA.

7 THE COURT: So they are now joined in the CDA?

8 MR. SLATER: They are all in the CDA together. Now,
9 Jurupa was previously in. They increased their take. Ontario
10 was previously in. They increased their take. But collectively
11 that 10,000 now is essentially collapsed within the same
12 enterprise. They're all -- everybody is together.

13 THE COURT: Intermingled now in the 40,000?

14 MR. SLATER: Correct, Your Honor.

15 And so we have continued, as you've observed, towards the
16 achievement of that objective.

17 THE COURT: That objective being Hydrologic Control?

18 MR. SLATER: Yes, Your Honor.

19 THE COURT: Okay.

20 MR. SLATER: And we are -- we have it. We have it.

21 THE COURT: Okay.

22 MR. SLATER: So it has been completed.

23 THE COURT: Thank you, Mr. Kavounas.

24 MR. WILDERMUTH: It's Mr. Wildermuth.

25 THE COURT: Mr. Wildermuth, I'm sorry.

26 MR. SLATER: So we have achieved, not only Judge Gunn's

1 high-line aspirational goal from way back in 2000 of 40- MGD, we
2 also achieved the objective of our compliance with Max Benefit
3 and have implemented that through Basin re-op and hydraulic
4 control.

5 THE COURT: Okay.

6 MR. SLATER: Now, that would not have been possible, Your
7 Honor, but for the commercial arrangements and stewardship
8 arrangements that were negotiated and agreed to as part of
9 Peace II. Nobody was going to spend the money; right? And
10 remember that I mentioned to you the --

11 (Co-counsel confer, not reported.)

12 MR. SLATER: Remember I said to you, Your Honor, that in
13 2000, there was sort of this artistic vagueness --

14 THE COURT: Yes.

15 MR. SLATER: -- on the issue of the assessment.

16 Well, as a part of the strategy to close that loop, the
17 priority for the cascading system that was contained in -- and
18 this is 6.2(b) of the Peace Agreement --

19 THE COURT: Peace I?

20 MR. SLATER: Peace II, Your Honor.

21 THE COURT: Okay. Okay. Yes.

22 MR. SLATER: -- sets forth a way for the parties to deal
23 with this open-ended question of assessments, tidies it up. And
24 here is -- here is the -- an important concurrent commitment. So
25 remember what I said about New Yield being transitory? Up until
26 2007, the concept of New Yield is transitory with the idea that,

1 if it had been proven, it could be rolled into a Safe Yield
2 Reset. Because, at some point, an activity is so proven and so
3 known and reliable that it is reasonable for Mr. Wildermuth to
4 include that input source into his estimate of Safe Yield.

5 THE COURT: I understand what you've told me. That's not
6 what the agreements said.

7 MR. SLATER: What agreement, Your Honor?

8 THE COURT: Well, it says, "Peace I," I believe. Give me
9 a moment.

10 MR. SLATER: Your Honor, I think you may be referring to
11 Peace II, 7.1, which is up there and why I wanted to distinguish
12 of why it's pivoting.

13 THE COURT: Hang on a second. Yes, it is. Correct.
14 Yes.

15 MR. SLATER: Okay. So we're on the same page.

16 What happens is that it is deemed as a provisional term
17 to satisfy the skeptics, the skeptics in the family. We don't
18 believe that you should be resetting Safe Yield on the basis of a
19 temporary or unproven project. So New Yield, you can have that
20 on a provisional basis, but you don't get to use it as Safe Yield
21 until it's proven over an extended period of time.

22 Now, 7.1 comes along, and 7.1 says, "You want us to go
23 forward with these desalters." That's a pretty significant
24 undertaking. And remember that I just showed you this provision
25 on the other side of this, which deals with how you account for
26 Watermaster assessments.

1 THE COURT: That's "(e)" you mean? Or --

2 MR. SLATER: Yeah. It's -- romanette (i) at the top of
3 the page.

4 THE COURT: Okay. I'm sorry. Oh, so --

5 MR. SLATER: Romanette (i) and romanette (ii).

6 THE COURT: In 6.2; is that --

7 MR. SLATER: Correct.

8 THE COURT: Okay. Paragraph 6.2(b), small Roman numeral,
9 (i)? Did I get that right?

10 MR. SLATER: It's 6.2, romanette (i) and (ii).

11 THE COURT: Yeah. Under subsection (b)?

12 MR. SLATER: Correct.

13 THE COURT: Okay.

14 MR. SLATER: So what's going on is they've tidied up.
15 They have closed the loose ends on how they are going to fund
16 these. They catch all assessments. And now we have this notion
17 of the Re-Operation occurring under hydraulic control, and
18 Mr. Wildermuth has changed his projections now of what's possibly
19 under New Yield; right? He's thinking it's not a nominal amount.
20 It's these numbers. Remember who's filing these
21 contemporaneously?

22 THE COURT: From Table 3.

23 MR. SLATER: Right. That's ultimately going to be filed
24 with the Court. This is relatively contemporaneous with this
25 agreement.

26 THE COURT: I got that.

1 MR. SLATER: Okay. So what they want is the parties want
2 an insurance that if New Yield shows up -- and it's induced
3 recharge attributable to the operation of the desalters, not the
4 water produced by the desalters; right, Your Honor? Because the
5 desalters produce groundwater.

6 THE COURT: Yeah. Pump groundwater.

7 MR. SLATER: Right. Okay. So the desalters are
8 producing groundwater. We need to know what color the water is.
9 We need to know whether it's basin Re-Operation water. We need
10 to know whether it's New Yield Kaiser water. We need to know
11 what color the water is because their water comes in different
12 colors.

13 THE COURT: Okay.

14 MR. SLATER: So what this provision says is if New Yield
15 shows up, you don't get to roll it into Safe Yield. You keep it
16 out.

17 THE COURT: Right.

18 MR. SLATER: Because we need it to underwrite the cost of
19 operation of the desalters.

20 THE COURT: Because you don't have to pay for
21 replenishment water, then.

22 MR. SLATER: Check. Exactly.

23 THE COURT: Okay.

24 MR. SLATER: So you're not paying for replenishment for
25 the water that the 400,000 acre-feet, that's the basin re-op.
26 You're not paying for that because that's controlled overdraft,

1 and that's permissible.

2 THE COURT: Right.

3 MR. SLATER: And you're not paying a replenishment
4 assessment for New Yield.

5 THE COURT: Right.

6 MR. SLATER: Okay. So what am I doing? I'm constraining
7 what my financial obligation is going to be and to go forward as
8 a collective, pursuant to the formula here, about how much I'm
9 only going to pay.

10 THE COURT: I'm following your argument.

11 MR. SLATER: Okay.

12 THE COURT: Okay.

13 MR. SLATER: So the -- what we'd like to point out is
14 that the term "New Yield," as used in the tentative -- I think at
15 various points, you do say that New Yield is comprised of
16 basin re-op and -- sorry. The desalter production is comprised
17 of -- the desalter production is comprised of re-op water and
18 New Yield. And at other points in the tentative, Your Honor,
19 it's not so clear. In fact, at one point, you -- the language
20 equates the two, equates production with New Yield as if they
21 were equivalent.

22 THE COURT: Aren't they equivalent?

23 MR. SLATER: No. Because --

24 THE COURT: Okay.

25 MR. SLATER: -- because desalter production is 40- MGD,
26 40,000 acre-feet a year; right?

1 THE COURT: Right.

2 MR. SLATER: Some portion of that, pursuant to this
3 schedule --

4 THE COURT: The Table 3 schedule?

5 MR. SLATER: Right.

6 THE COURT: Okay.

7 MR. SLATER: -- is, what, Your Honor?

8 Some of it is hydraulic control -- basin Re-Operation
9 water. Some of it is basin re-op, the color of the water. Some
10 of it is basin re-op, and some of it is New Yield. As you can
11 see from the table --

12 THE COURT: Right.

13 MR. SLATER: -- some of it is the Kaiser water. It gets
14 back to the cascading priority or call. You know, what's the
15 order of the call to satisfy the desalter production obligation?

16 THE COURT: Isn't it -- but at some point, it's water in
17 and water out?

18 MR. SLATER: Well, yes, Your Honor. But what are we
19 trying to divide? What we're trying to understand is if there's
20 not enough water under a right or an allocation, Watermaster has
21 to go buy replenishment water to keep the basin whole. It's a
22 zero sum.

23 So we have a Safe Yield, let's just say at the time this
24 was occurring, 140,000 acre-feet. There needs to be rights to
25 cover the additional 40-.

26 THE COURT: Well, isn't the -- isn't the 40- -- maybe

1 this is where the confusion is.

2 MR. SLATER: Yes?

3 THE COURT: Isn't the 40- -- the 40-, what you're telling
4 me then is not within the 140- that the -- the physical solutions
5 set forth in the Judgment?

6 MR. SLATER: Yes, Your Honor. Exactly. Exactly. That's
7 exactly right.

8 THE COURT: Okay.

9 MR. SLATER: So let me come back. All right?

10 Here is what the original allocation of rights was to the
11 various pools; right?

12 THE COURT: Right.

13 MR. SLATER: All right.

14 THE COURT: That's right.

15 MR. SLATER: Those are inviolate. Nobody who held rights
16 in those categories raised their hand and said, "We'll use our
17 water to produce it from the desalters." Zero; right?

18 THE COURT: Right.

19 MR. SLATER: So now we have 40- MGD to account for,
20 40,000 acre-feet. Where does that come from? Here is where it
21 comes from, Your Honor.

22 THE COURT: It's set forth in Table 3?

23 MR. SLATER: Oops. What did I do?

24 (Pause in proceedings.)

25 MR. SLATER: Your Honor, before I came here today, I used
26 to teach math in high school before I went to law school, and I

1 asked Peter, you know, I said, "You know, do they have an
2 overhead?" I mean I'm ashamed to admit that I used to use
3 mimeograph paper.

4 THE COURT: Same here. I actually typed on carbon paper,
5 but that's another story.

6 MR. SLATER: So for our 40- MGD, Your Honor, this was the
7 original schedule. And you'll note that all of the 40,000 MGD or
8 all the production -- 39,320. So close; close enough.

9 THE COURT: 39,360, you mean?

10 MR. SLATER: 320, isn't it?

11 THE COURT: Is it this figure (indicating)?

12 MR. SLATER: No. There you go. Right there
13 (indicating). That's your annual production; right?

14 THE COURT: Okay.

15 MR. SLATER: When the whole thing is humming, the
16 mousetrap is fully complete, we've -- 39,320. That's what we're
17 doing.

18 THE COURT: Okay.

19 MR. SLATER: So all of that production has to be
20 accounted for.

21 THE COURT: Or there has to be replenishment obligation?

22 MR. SLATER: Yes, Your Honor.

23 THE COURT: Okay.

24 MR. SLATER: And so, thus, the parties are in the
25 background nervous about this enterprise. And one who hedges
26 their risk for their communities and their ratepayers, they are

1 saying, "We want the New Yield. We want this schedule. We want
2 to understand that this is how it's going to go." Before what?
3 Before we came back to Your Honor in 2010 with a whole financing
4 package to build it; right?

5 THE COURT: Right.

6 MR. SLATER: So, in fact, there are more "whereases" in
7 that agreement than I've ever seen in an agreement in my life.
8 Because the bond counsel were going crazy. They wanted all of
9 that stuff to make sure that this was covered.

10 So one of the items that was in your tentative -- and
11 there was only one line -- it rejected our request to change this
12 schedule. And we had offered a revised schedule. And this was
13 the revised schedule. And I will tell that you that there's
14 detail across there.

15 THE COURT: I think I recognize this schedule.

16 MR. SLATER: Yes. This was filed along with the original
17 motion.

18 THE COURT: Yeah. This was in Mr. --

19 MR. HERREMA: This is an attachment to the
20 Watermaster Resolution that adopted the Safe Yield Reset
21 Agreement.

22 THE COURT: Okay. Just give me a second. In fact, we've
23 been going for a little more than an hour. I think my staff
24 needs a break. We'll take ten minutes. Okay?

25 MR. SLATER: Thank you, Your Honor. I appreciate your
26 patience.

1 THE COURT: Okay.

2 (A recess was taken.)

3 THE COURT: Back on the record.

4 And the Court did find the chart. It's Attachment II to
5 the initial filing, October 23rd, 2015. It is the first page in
6 that attachment. So I think we're ready --

7 (Pause in proceedings.)

8 THE COURT: Okay. So we're back on the record.

9 Just a note for the record, the Court identified the
10 chart to which Mr. Slater alluded just before the break, and it's
11 contained in Attachment II to his original filing, October 23,
12 2015.

13 MR. HERREMA: Your Honor, that chart is also Exhibit C to
14 Watermaster's Resolution 2015.

15 THE COURT: All right. Thank you, Mr. Herrema.

16 Mr. Slater, go ahead, please.

17 MR. SLATER: Okay. Your Honor. Thank you. I'm going to
18 put --

19 THE COURT: Do we need to press a button, Mr. Pingrey?

20 (Pause in proceedings.)

21 THE COURT: Back on the record.

22 MR. SLATER: Okay. Your Honor, I want to show a couple
23 of things here and then make our request that's pertinent to
24 this.

25 So let me start with, this is a document which purports
26 to be Watermaster's exercise of discretion in submitting a new

1 schedule. And what you see across the top of this exhibit, is an
2 effort to apportion out the color of water to cover the 40,000
3 acre-feet of groundwater production that occurs from the
4 desalters. So you can move through Columns E, F, G, H -- you
5 know, and so on, and you can see how the apportionment is
6 proposed to occur.

7 THE COURT: Let me stop you for a second.

8 MR. SLATER: Yes, sir.

9 THE COURT: Let me identify this completely for the
10 record since I'm sure -- I wouldn't be surprised if someone else
11 reviewed this after me. It's dated August 16, 2015, in the upper
12 right corner, and it's entitled in its entirety: Safe Yield
13 Reset Implementation Desalter Replenishment Accounting
14 Illustration per Peace II Agreement, Section 6.2, in paren,
15 ((p) (a), 6.2) close paren. And June 11, 2015, (key principles),
16 close paren.

17 So we've got it?

18 MR. SLATER: Correct, Your Honor.

19 THE COURT: Thanks.

20 MR. SLATER: And I wanted to -- again, just so the Court
21 would be confident, here is 6.2, Article VI, and the order of the
22 call for offsets. That's probably the best word, Your Honor.
23 There's production occurring, and there needs to be offsets
24 because of that schematic or the basic table, which is 140,000
25 apportioning among all existing rights plus 40- MGD of new
26 production, and this is how we would account for it.

1 THE COURT: When you're talking about offsets and 6.2,
2 what you're really talking about is sources for the production.

3 MR. SLATER: Correct, Your Honor.

4 THE COURT: Okay.

5 MR. SLATER: What are the various sources? As I've been
6 calling it, the color of water.

7 THE COURT: Okay.

8 MR. SLATER: So as a part of -- first of all, as a part
9 of Watermaster's proposal, there was a request made to substitute
10 this schedule, as per the exhibit.

11 THE COURT: Yeah. The Safe Yield Reset Implementation
12 Schedule.

13 MR. SLATER: Correct, Your Honor.

14 There was a proposal to substitute this schedule. And
15 among other benefits, I would say, first, it addresses the -- a
16 problem identified that, given the delay that occurred in getting
17 the desalters up and operational, that the elongated schedule
18 would result in water going unused during the initial term of the
19 Peace Agreement. So it was actually -- it would not be able to
20 be produced in the time period. That was the first thing.

21 THE COURT: You mean certain water would stay in the
22 ground?

23 MR. SLATER: Yes, sir.

24 THE COURT: Okay.

25 MR. SLATER: In other words, there was 400,000 acre-feet
26 set aside and under the original schedule, because of the delay

1 in construction, not all of the water would be produced.

2 THE COURT: Okay.

3 MR. SLATER: That was the first thing.

4 THE COURT: That's the --

5 MR. SLATER: The second thing --

6 THE COURT: -- that's the Re-Operation water?

7 MR. SLATER: Correct, Your Honor.

8 THE COURT: Okay.

9 MR. SLATER: The second thing that's important to note is
10 Watermaster has achieved -- I should say the parties have
11 achieved that Herculean objective of constructing the 10- MGD of
12 desalter ending in secured hydraulic control. So mission
13 completed. So there's no present need to retain water to ensure
14 performance on an elongated schedule. What we want to do is make
15 sure it's pumped, the interests of the basin have been satisfied,
16 and, hence, we propose the revised schedule.

17 Now, to the best of my knowledge, Your Honor, there's no
18 opposition to this.

19 Apparently the City of Chino objects, so I misspoke.

20 THE COURT: Okay.

21 MR. SLATER: So it is the intention then to substitute
22 this schedule for the original schedule.

23 THE COURT: And that original schedule was Table 3 that
24 you identified previously?

25 MR. SLATER: Correct, Your Honor.

26 THE COURT: Okay.

1 MR. SLATER: There is also a matter that I'd like to just
2 sort of tidy up. I think, again, the tentative does a great job
3 of going through the fact that induced recharge is a component of
4 New Yield. It recognizes it's a component. There could be other
5 things that are New Yield like stormwater; right? But induced
6 recharge is a component of New Yield. And one of the things that
7 has been raised through the papers -- although not necessarily in
8 Your Honor's order, but I just wanted to make sure for purposes,
9 again, of this may not be the last time we discuss this.

10 You know, God bless Anne. Anne Schneider, again, was
11 amazingly thorough. She used to get up and ride like hundreds of
12 miles on a bike, and she would write these things. So they
13 always had a character to them, a thoroughness, a clarity. And
14 after we had our hearing on the Safe Yield Peace II Agreement in
15 2007 -- we had a hearing in front of Judge Gunn. She had our
16 initial set of recommendations. There was Q and A involved in
17 that hearing, and there was an alarming piece of news that had
18 come out of Watermaster in, like, August of 2007. And that
19 alarming piece of news was -- you know, the aspirational
20 objective of everybody in the basin was to do all these good
21 things so yield would incline.

22 Every reasonable investment had been made to cause that
23 incline to occur. But because of conditions, like, armoring of
24 the basin, the projections developed by Wildermuth Environmental
25 in that time frame of August/September, for the first time that I
26 can recall projected a decline in Safe Yield. And so when we got

1 to the hearing in front of Judge Gunn, there were questions about
2 whether all of this made sense in light of the decline of
3 Safe Yield.

4 And I just thought that, for the purposes of making sure
5 the Court is aware that this is unambiguous, this is completely
6 known and understood in the special referee's final report and
7 recommendation on motion of approval of the Peace II documents,
8 which, Your Honor, I don't believe has been filed yet.

9 THE COURT: Okay.

10 MR. SLATER: And we'll lodge it with the Court.

11 She has on page 28 -- sorry. On page 27, that the
12 Safe Yield is going to decline over time from 140,000 acre-feet
13 ultimately to 120,000 acre-feet. Then she cites Mr. Wildermuth's
14 technical report on page 8-2, and here it is.

15 Again, we'll lodge this with the Court. You have this
16 somewhere in your voluminous files, Your Honor. But there was a
17 pretty active discussion, and you can see my response at the
18 time.

19 THE COURT: And this was for a hearing in front of
20 Judge Gunn?

21 MR. SLATER: This was following the hearing in front of
22 Judge Gunn much in the way we are proceeding now, Your Honor. We
23 were presenting then the Peace II Measures, and we had
24 Mr. Scalmanini and Ms. Schneider to my right, and they were
25 answering -- or asking questions, and we were trying to present
26 the record so that they understood it.

1 THE COURT: All right.

2 MR. SLATER: So my only point in this: To the extent
3 that there is any question or any doubt as to whether the parties
4 intended to contract in the manner they did in Peace II, this
5 ruling -- the Court's ruling took into account the fact that the
6 Safe Yield could decline. And yet the parties were still,
7 pursuant to contract, sequestering the New Yield that was
8 attributable to induced recharge from the Santa Ana River.

9 THE COURT: Okay.

10 MR. SLATER: Okay.

11 THE COURT: All right.

12 MR. SLATER: So with that, Your Honor, we renew our
13 request for you to consider substituting the new schedule and ask
14 that you take into account in your -- any final order, a
15 consistent treatment of the term Re-Operation and New Yield.

16 As we said, Re-Operation water is a portion of the water
17 produced by the desalters. It's not all. The program of
18 Re-Operation will cause induced inflow from the Santa Ana River,
19 which is -- was contemplated by the parties, relied upon by the
20 parties, and has been accounted for as New Yield.

21 THE COURT: Okay. And you mentioned someplace in my
22 tentative ruling that you thought I was just wrong. If you could
23 point that out, I would appreciate it.

24 MR. SLATER: Your Honor, I would never call you wrong.

25 THE COURT: I know. A misled typographical error -- I
26 don't know.

1 MR. SLATER: Yes. Again, Your Honor, it's one of these
2 things where, not only in this basin does arithmetic matter or
3 numbers, but words do too. And on page 30(a)(i), the first
4 point --

5 THE COURT: Okay?

6 MR. SLATER: -- the Court concludes that New Yield, in
7 the above paragraph, means water produced/pumped by the
8 desalters. It's true, Your Honor, that it is apportioned, just
9 not all.

10 THE COURT: Okay.

11 MR. SLATER: And, again, over on page 31 of 63, in (d),
12 Roman (i) -- the last sentence says, "Finally the Court notes
13 that the New Yield includes desalter production and desalter
14 induced recharge as well as desalter overdraft."

15 THE COURT: Hang on a second. All right. Okay. Yes.
16 So the incorrect statement would be that New Yield would
17 include -- would not include desalter production --

18 MR. SLATER: Correct, Your Honor.

19 THE COURT: -- but it would include desalter induced
20 recharge?

21 MR. SLATER: Correct, Your Honor.

22 THE COURT: But not desalter overdraft. Because --

23 MR. SLATER: The basin re-op.

24 THE COURT: Okay. Because the desalter overdraft is a
25 separate --

26 MR. SLATER: Correct.

1 THE COURT: -- category of accounting.

2 MR. SLATER: You got it.

3 THE COURT: Okay.

4 MR. SLATER: Thank you, Your Honor.

5 THE COURT: All right. Thank you.

6 MR. SLATER: And I would say, again, in the interest of
7 time, we probably noticed places in the document for -- if it
8 were helpful to the Court, we might present all of those
9 instances in the Document. 63 pages, we might have missed one or
10 two.

11 THE COURT: I wouldn't be surprised. I missed typos and
12 other things myself after I reread it, so --

13 MR. SLATER: I understand, Your Honor.

14 THE COURT: Because those are technical. These are
15 substantive remarks.

16 MR. SLATER: Your own Herculean efforts are duly noted.

17 THE COURT: Thank you so much.

18 MR. SLATER: Okay, Your Honor. Then if I might, what I'd
19 like to do is return to 2000.

20 THE COURT: Okay.

21 MR. SLATER: Okay. So the architecture for Peace I --
22 the architecture for Peace I, one of the really remarkable
23 things, Your Honor, that you should be proud of -- and I know all
24 the producers sometimes even take it for granted -- is they've
25 done an incredible job at putting in place a vehicle to allow
26 water to be stored in this basin. I think, as we sit here today,

1 we are approaching half a million acre-feet of water that's
2 successfully held and stored in this basin. And it's held under
3 accounts, and by comparison to many other places in the state
4 where you can't -- pretty much the Wild West -- you know, the
5 Sustainable Groundwater Management Act being adopted, here we
6 have a pretty well-understood, organized water storage unit with
7 accounts. Yes, there's an effort to try to manage that.

8 But my point was that was one of the aspirational goals,
9 and it's been successful. And another thing that the
10 stakeholders really wanted to accomplish, they wanted to create
11 an environment that allowed the seamless transfer of water. So
12 these entitlements are inviolate. They can't be changed. But
13 the water can move around; right? It can move around. And the
14 most customary way that transfers occur is between members of the
15 Appropriative Pool. They'll have an agreement with each other,
16 and it is on a pretty routine process for nominating the water to
17 be transferred, and it's basically handled on a consent calendar,
18 so long that there's not some unusual circumstance that -- that
19 are accommodated.

20 But back in 2000 -- back in 2000, there was, again, an
21 interest in something more aspirational. And the notion was that
22 there was a lot of water sitting in that 82,8-, that inviolate
23 82,8- that's held by Ag Pool -- that could be more efficiently,
24 Your Honor, moved as surplus. So 82,8- is the amount of water
25 that's prescribed for the Ag Pool. It's inviolate right. But
26 we're all about using every drop of water in accordance with the

1 Constitution. So if it's unused by the Ag Pool, it flows through
2 or flows down not to the Non-Ag Pool, who has a fixed priority,
3 fixed quantity, it flows to the Appropriative Pool as effectively
4 surplus water.

5 From 1978 to 2000, the Ag Pool could vacillate as it was
6 going to use the water; right? It could go up, go down, whatever
7 it wanted to do as long as it's reconciled with the 82,8-. And
8 the Appropriative Pool was benefitting from that as surplus. If
9 you didn't use it, we got it. But it wasn't -- what? -- it
10 didn't have the air of predictability.

11 So in an environment where cost -- which was that piece
12 of legislation the state passed to say, "You're going to have to
13 be able to demonstrate the reliability of your water supply
14 before you allow new development"; in an environment where each
15 of these municipalities had an obligation to prepare what's
16 called an "Urban Water Management Plan," where they've got to do
17 an inventory of all their available sources and make commitments
18 about how they are going to use it and they have to go to the
19 State Department of Water Resources and prepare and file their
20 plan; in an era where they need more information and more
21 reliability, what they wanted to accomplish was some commercial
22 reliable structure to cause the transfer of that Ag water, not
23 changing the 82,8-, but taking the category of that unused
24 surplus and causing it to move in bulk.

25 So being in the Appropriative Pool, this is very
26 important to my planning function. And so I'm not worried about

1 the vagaries of what's going on from year to year, I know that
2 I'm going to have an early transfer quantification. And that
3 became known as "The Early Transfer Provision."

4 And there was something else that was going on at the
5 same time, though, Your Honor, and I think --

6 (Co-counsel confer, not reported.)

7 MR. SLATER: Pardon me, Your Honor. I'm trying to find
8 the citation here.

9 THE COURT: Take your time.

10 MR. SLATER: While I'm finding it, I can speak to
11 Your Honor.

12 THE COURT: Yes?

13 MR. SLATER: The other orderly process that was, you
14 know, brilliantly installed into the Judgment was the notion that
15 agricultural uses were going to permanently transfer over time.
16 So there's the notion of annual surplus; right? And then there's
17 the notion of, "Well, some of those lands are going to be
18 actually ready for development and ultimately developed."

19 So in 1995 -- in 1995, Your Honor -- and this is
20 referenced --

21 (Co-counsel confer, not reported.)

22 MR. SLATER: In 1995, Your Honor, there was an effort to
23 try to quantify how much water ought to go along with these land
24 use conversions. And, Your Honor, you have on your page 20 --
25 your page 20, paragraph 3, which references "Allocation of
26 Safe Yield Rights."

1 THE COURT: Yes?

2 MR. SLATER: And this precedes your paragraph 7, which is
3 conclusion. With the 1995 amendment for judgment set --

4 THE COURT: Wait. In 1995 --

5 Yeah. It's a little fast for my court reporter.

6 MR. SLATER: Sorry.

7 THE COURT: With the 1995 amendment, the Judgment set a
8 prioritized list of claims upon unproduced equitable water.

9 MR. SLATER: Correct.

10 THE COURT: Okay.

11 MR. SLATER: But, Your Honor, up on (3), romanette (i),
12 you reference a 2.0 allocation. And, Your Honor, that's
13 incorrect.

14 THE COURT: Was it 2.6?

15 MR. SLATER: It was. In 1995, it was 2.6.

16 THE COURT: Yes. I think that was because I was using
17 the Restated Judgment that had the new figure. What's 2.6 at one
18 point -- and this I'm pretty familiar with. 1.3, it was divided
19 in half. 1.3 went into the Safe Yield general Appropriative Pool
20 per use and pumping, and 1.3 acre-feet went directly to the
21 producer whose company, for lack of a better description, covered
22 that land.

23 MR. SLATER: Precisely, Your Honor.

24 THE COURT: And then it got amended to 2.0 going directly
25 to the producer.

26 MR. SLATER: Precisely, Your Honor.

1 So here is what I think is important about that time
2 sequence.

3 THE COURT: Okay?

4 MR. SLATER: In 1995, there was 2.6, and it was being
5 split -- right? -- down the middle. 1.3 to the Land Use
6 Conversion Agency and 1.3 to all the people who held Safe Yield
7 rights, which, by the way, is the same measurement for early
8 transfers. They are the same.

9 THE COURT: Tell me that again.

10 MR. SLATER: Yes. When we have Safe Yield, there's an
11 apportionment for operating Safe Yield; right?

12 THE COURT: Right.

13 MR. SLATER: So we have operating Safe Yield, and that's
14 apportioned among the appropriators, and they have their relative
15 share; right? And so back in 1995, all of those people who held
16 Safe Yield rights were getting one-half of every Ag conversion at
17 the 2.6 level.

18 So there's 2.6. 1.3 is going to all of those people
19 every time there's a land use conversion. And 1.3 is going to
20 the Land Use Conversion Agency. Okay?

21 THE COURT: Got it.

22 MR. SLATER: So now we go forward to 2000, and remember
23 I just said there was this early transfer provision, which took a
24 high-line off and said, "This 32,000 is going over to the
25 appropriators for them to use in accordance with their share of
26 operating Safe Yield."

1 THE COURT: Right.

2 MR. SLATER: Okay. Now, what happened is -- at the same
3 time concurrently, Your Honor -- is that number going to the
4 Land Use Conversion Agencies? It goes up from 1.3 to 2.0.
5 There's no more sharing in that water. They get it all.

6 So the Land Use Conversion Agency in 1999 was getting
7 1.3 acre-feet with the land use conversion. And the day after
8 the Peace Agreement, they are getting 2.0.

9 THE COURT: Right.

10 MR. SLATER: So all of those people who had Safe Yield
11 that were getting water, 1.3 every time there was a land use
12 conversion, are no longer getting that.

13 THE COURT: Right.

14 MR. SLATER: Okay.

15 THE COURT: Okay.

16 MR. SLATER: So these are concurrent transactions; right?
17 They are both represented in Section 5.3 of the Peace Agreement.
18 They are both transfers contemplated by 5.3. Neither affects
19 this. Neither affects the 140-. They are -- neither affects the
20 82-. They are subtractions from the 82-.

21 THE COURT: From the 82,8- -- correct? --

22 MR. SLATER: Correct.

23 THE COURT: -- from the Ag Pool water.

24 MR. SLATER: But Ag Pool entitlement is not going down,
25 and if there's overuse, the Ag Pool didn't have to worry about
26 it. That all has to be accounted for by the recipients, the

1 appropriators.

2 THE COURT: I'm following, yes.

3 MR. SLATER: Okay. So immediately, almost immediately
4 after the Peace Agreement was executed, we began a process
5 because Anne was thorough, and Judge Gunn wanted her to be. They
6 started us on a process of having to amended our rules, and they
7 said, "Look. You've got stuff to do here. You need to amend
8 your rules," that they are old. "They are archaic. They don't
9 respond to the circumstances as they now exist."

10 So we began a process. And, you know, Your Honor, I
11 think we did everything she had on her list. And except for one:
12 We tried to get to the question of what do you do if there's not
13 enough water coming across in 82,8- to satisfy both the early
14 transfer and the land use conversions? What do you do? And sure
15 enough, when we set about to do the allocation of how much water
16 was coming across, we found out in the very first year that there
17 wasn't enough water to handle both.

18 So the Peace Agreement comes in day one. Watermaster
19 accounting package is approved. Voila, we're short. There's not
20 enough for both the early transfer and the land use conversion.
21 Because collectively they were taking, along with the Ag Pool,
22 more water than was in 82,8-, so approximately 5,000 acre-feet.

23 I asked this morning so I could represent to the Court
24 that my best estimate is actually immediately upon the execution
25 of the agreement. We were short 4,872 acre-feet. And this would
26 have been in -- this is part of every assessment package ever

1 adopted by Watermaster going back to 2000.

2 So what did Watermaster do? Well, we didn't ignore it.
3 We did the best we could. So we adopted a rule, and the first
4 rule was in the version that -- it was in the 2000 version --
5 2001 version of the rules and regulations, and it was in the
6 former -- 6.3 of the rules and regulations.

7 And this is to reflect for you, Your Honor, that -- you
8 know, not to discredit or to diminish the advocacy of the great
9 lawyers in this room -- Jimmy was there. Art Kidman. Tom Bunn
10 was there. JC was there. Marilyn. Fred, no. But Fred was
11 there before. But a lot of people -- lots of people participated
12 in these very difficult negotiations about what we were going to
13 do to the sticky issue. And you know what? We did the best we
14 could to try to come up with an approach.

15 And here is what we ultimately did, is we punted. We
16 said, "We are going to do it this way for now. We are going to
17 do it this way for now," as contained in romanette (ii) on
18 page 33, 6.3 -- 6.3(c), romanette (ii). We said, "Look. This is
19 the best we could do." And Anne said, "You need to do better."
20 And we tried. And finally we came up with -- and she had some
21 recommendations that we ought to ultimately try to do -- put it
22 into the contract, and we said, "Look we think that it is true
23 that it could be in a contract, but we're embarking on this
24 desalter program. We're not sure we need to do that yet. Give
25 us time, and we'll figure it out."

26 So in her approval -- sorry. In the -- she, again --

1 What was that? Sorry.

2 (Co-counsel confer, not reported.)

3 MR. SLATER: So this is my response to the Court's
4 inquiry: This was filed on June 15th, 2001, transmittal of
5 revised rules, regulations, explanation of revisions.

6 I apologize for not filing this, Your Honor, previously.
7 Because we don't know what we don't know, and we didn't know
8 where your tentative was going until we knew. And now we've read
9 it, and we think this is pertinent. We'll, again, lodge this
10 with you.

11 Here is what I responded to the referee at the time and
12 to the Court: This is -- the date. Sorry -- it's June 15, 2001.
13 The Court gave us a year, Your Honor, to get our house in order
14 on the rules and regulations. And so Section II or (2) includes
15 a paragraph, which basically says, "Your Honor, I tried. We
16 tried. They tried. They didn't kill each other. And they
17 agreed to continue. We now recognize it was critically
18 important, but it's the best we could do for then."

19 THE COURT: "Them" being the Appropriative Pool?

20 MR. SLATER: "Then" being how we were going to cover the
21 shortage between not being able to fulfill the quantity of early
22 transfer and land use conversions.

23 Because there are just as many people in the room who
24 believe that early transfer had a higher priority than those that
25 believed had the land use conversions, because of those
26 concurrent arrangements that were made where 2.6 goes to 2.0;

1 right?

2 THE COURT: Right.

3 MR. SLATER: All right. So this is the state of the
4 world that exists until we do -- what? -- until we are now
5 prepared to do the next 10- MGD; right? So when the next 10- MGD
6 comes around, the parties, as part of the Peace II process,
7 decide that "We want to do it another way."

8 So remember, this signals to the Court, "We're working on
9 it. If we need to, we'll come back and revisit it without
10 prejudice." So in 2006/2007, in the Peace II Agreement, 6.3 is
11 amended to try to bring together those people in the room, those
12 appropriators in the room -- broad room -- in the family. Those
13 appropriators in the family bring them together and say, "Okay.
14 You who relied on early transfer and you who relied on land use
15 conversion, we're going to treat you the same. And we're going
16 to recognize both of you pursuant to this formula."

17 So this was -- 6.3 was a formulaic arithmetic workout of
18 the contested points that existed back in 2000 that we tried to
19 address temporarily in the earlier form of 6.3. But what's new?
20 A new round of desalting. There's no state money coming in.
21 There's no 235 million dollars, 40 million dollars for the
22 desalters. All of this is going forward, and people want to have
23 firm financial commitments understood as we're going forward on
24 this enterprise, and they want this fixed. And so the parties
25 agree to this formula.

26 Now, this predates -- and, by the way, so this was part

1 of the Peace II Measures. This was presented to Judge Gunn in
2 2007, and it is ordered as a part of the 2007 order approving the
3 Peace II Measures.

4 THE COURT: It's his specific ruling with respect to this
5 rule?

6 MR. SLATER: It does not mention the rule. It mentions
7 all of the Peace II Measures, including the Watermaster
8 Resolution for these, called the "discretionary actions."

9 THE COURT: Okay. So there was a general reference rules
10 and regulations as discretionary actions in the order? Is that
11 how it's read?

12 MR. SLATER: We'll read it to you here.

13 MR. HERREMA: They're labeled as "discretionary actions."

14 MR. SLATER: So in the Watermaster Resolution, I believe
15 it says, "discretionary actions to amended Watermaster Rules and
16 Regulations." They are referenced in the referee's report, which
17 is adopted by the Court. And then they are ordered approved.

18 THE COURT: All right.

19 MR. SLATER: This is in -- again, this is before the --
20 before they went forward on the next round of desalters. This is
21 a launching pad.

22 THE COURT: Okay. Yeah. The additional 10 million
23 gallons per day?

24 MR. SLATER: Correct.

25 THE COURT: Okay.

26 MR. SLATER: So this becomes, again, part of the fabric,

1 the structure that allowed the enterprise to go forward. And
2 without qualitatively knowing, no one can get into the minds of
3 any of the individual producers as to how relevant or important
4 this specific aspect was. But we do know it was part of the
5 package. It was approved. And, in actual consequence, it's
6 material. Because since 2000, we have never had enough water in
7 any year to satisfy both the land use conversion and the early
8 transfer claims. And it's typically -- before this period of
9 time, Your Honor -- basically at somewhere between, on the low
10 end: 3400; high end: 9,000. And that path is continued.

11 THE COURT: 34,000 acre-feet to --

12 MR. SLATER: 3400. Sorry, Your Honor.

13 THE COURT: 3400 acre-feet to 9,000 acre-feet short each
14 year?

15 MR. SLATER: That was between 2000 and 2006 when they --
16 when they -- the parties collectively supported this, and the
17 judge ordered the inclusion of this paragraph in the rules.

18 THE COURT: Okay.

19 MR. SLATER: So with progress, we come to the Safe Yield
20 Reset process -- sorry. We come to 2000 with Condition --

21 MR. HERREMA: Condition Subsequent Number Eight.

22 MR. SLATER: Thank you.

23 Condition Subsequent Number Eight. This is -- again, now
24 Judge Gunn grew ill, and he was replaced for a period of time.
25 And we had filings and ultimately we find our way to you,
26 Your Honor.

1 THE COURT: Right.

2 MR. SLATER: And this is right before -- also we're
3 getting prepared to -- we're actually working on the financing
4 arrangements, which become part of the -- I think it's '12, the
5 Desalter Authorization? It's in the back of that.

6 This is your authorization of going forward on the
7 desalters and all the financial provisions.

8 THE COURT: I remember.

9 MR. HERREMA: Resolution 2010-04.

10 MR. SLATER: Yeah. It's Resolution 2010-04. Again,
11 it's to say, Your Honor, that this issue was brought to the
12 Court's attention going back to what Anne Schneider had
13 requested; right? You're operating in a world in which there's a
14 decline in Safe Yield. You need to answer some questions.

15 So we come back to you to clarify what we had done in
16 6.3, which, on its terms, does not say it's applicable in the
17 event of a decline in Safe Yield; right? So no one had ever --
18 this is key: No one had ever objected to 6.3 in its original
19 form in 2001.

20 THE COURT: I think that's disputed, though; isn't it?

21 MR. DONLAN: Yes.

22 THE COURT: Yeah. I think JCSD disputes that in the
23 paperwork, but I'll take your argument.

24 MR. SLATER: I'd be shocked. Everybody signed the
25 Peace Agreement, Your Honor. Peace II is different.

26 THE COURT: Okay. I don't want to go off on a tangent.

1 MR. SLATER: Okay. I'll stand corrected if it turns out
2 that they did not sign it in 2001.

3 THE COURT: There was some paperwork that they objected,
4 backed off or something. I can't remember exactly.

5 MR. SLATER: Okay. So in 2000 -- my point would be this:
6 2001, there was this conflict. A discrepancy was identified
7 associated with trying to recognize early transfer and land use
8 conversions. You couldn't fill both.

9 THE COURT: Okay. The discrepancy being there wasn't
10 insufficient water?

11 MR. SLATER: Correct.

12 THE COURT: Okay.

13 MR. SLATER: Then in 2007, there's a workout. A new
14 workout, but there was nothing in the document itself that
15 expressly said that those terms were applicable in the event of a
16 decline in Safe Yield. Now, I could say to you based on the same
17 materials I presented to you before that -- definitely within the
18 mind of the parties -- that there could be a decline in
19 Safe Yield, and that's what Wildermuth projected in the technical
20 reports. That was in the background, but the order -- the
21 contractor did not say that.

22 So in 2010, that order comes in. Now, my point would be,
23 Your Honor, I've been very careful to read your tentative.

24 THE COURT: Thanks.

25 MR. SLATER: And if Your Honor's opinion is that that
26 agreement was wrong or that it could be changed later, I think

1 there are -- for our purposes, we have questions for our future
2 enforcement if the ruling were to be 6.3 is invalid because it
3 comes up with a different approach than the one -- that your
4 order might be read to say, which is, land use conversions have
5 priority. I'm not sure.

6 So if Your Honor is saying land use conversions have
7 priority in the event there's a shortage, we need to know that.

8 THE COURT: That's my order right now.

9 MR. SLATER: Okay.

10 THE COURT: I'm not ruling it invalid. It was ambiguous,
11 in my view, and that my order is to clarify.

12 MR. SLATER: And so, Your Honor, I'm trying to provide a
13 context so that, in making your final order, you will appreciate
14 there was an effort to try to resolve this, that the parties
15 hadn't, as a part of their intention, to resolve it.

16 The formula of 6.3 is pretty specific. "6.3"
17 being 6.3(c). And Watermaster has applied that in each year in
18 its assessment packages without limitation since it was adopted
19 in 2007.

20 THE COURT: I thought 6.3 -- yes, which we have on the
21 overhead. And I have in the request for judicial notice -- lists
22 these out, and I thought the order was correct. It just needed
23 to be clarified that they need to be applied in the order set
24 forth. And so that's where I thought the ambiguity arose.

25 They are listed 6.3(a)(1) to the Agricultural Pool -- I'm
26 not quoting the whole thing:

1 Sub (2), the land use conversions before October 1, 2000.

2 Sub (3), the land use conversions completed after

3 October 1, 2000.

4 And (4), to the early transfer. And for me, that set
5 forth a prioritized order that needed to be clarified with a
6 further order of the Court, and so that's where I thought the
7 ambiguity lies.

8 MR. SLATER: And I think, Your Honor, the understanding
9 which has been contained in the assessment packages that I've run
10 since 2007 have treated them in equal priority. So if your
11 intention is to prioritize the land use conversions, first, we
12 want to confirm that that's what you intend to do.

13 THE COURT: It is.

14 MR. SLATER: And then, there's a question of "we have a
15 custom and practice," I think of Rule -- in your order. I think
16 it was 4.8 that said that this was not to be retroactive.

17 THE COURT: Yes?

18 MR. SLATER: If it's to be retroactive, then we have tens
19 of millions of dollars that --

20 THE COURT: It was not to be retroactive because it was a
21 clarification, and I didn't want to go back and change history.

22 MR. SLATER: Okay.

23 THE COURT: Going forward, it should be clarified and put
24 in effect. And, again, it was -- I think it's also, having heard
25 your argument, appropriate not to make it retroactive because it
26 was a workout of a solution with a problem that existed at the

1 time. So I understand.

2 The retroactivity, if I were to make the order
3 retroactive, it would create a huge number of problems with
4 respect to reallocations and replenishment obligations for all of
5 the parties; is that correct?

6 MR. SLATER: That's correct.

7 THE COURT: I don't want to do that.

8 MR. SLATER: I think if Your Honor -- again, just so that
9 we can inform you --

10 THE COURT: Yes?

11 MR. SLATER: -- on this important matter --

12 THE COURT: Yes?

13 MR. SLATER: -- if you would like us to post hearing
14 today to give you some sort of an accounting so that you could
15 see what the financial impact of this decision is, just to inform
16 you, I understand what your answer is. And we will -- believe
17 me, Your Honor, I understand. We will faithfully implement it
18 but just to make you aware of what the financial consequences are
19 of your decision.

20 THE COURT: I think that would be good. Yes.

21 MR. SLATER: With that, Your Honor, I don't think I have
22 anything else further --

23 THE COURT: To add?

24 MR. SLATER: -- to add.

25 THE COURT: Okay. All right. I see a person -- a couple
26 of people standing to get my attention. Ordinarily what I'd do,

1 I'd go straight to the opposing parties for additional argument.

2 But we have Mr. Donlan here on behalf of JCSD?

3 MR. DONLAN: Yes, Your Honor. I would like to respond to
4 Mr. Slater's --

5 THE COURT: Yes. I'll --

6 Mr. Kidman, I'll get to you in just a moment, if I may,
7 unless it's urgent.

8 MR. KIDMAN: No.

9 THE COURT: Go ahead, please.

10 MR. DONLAN: First of all -- and thank you, Your Honor.
11 You do address retroactivity in your order. And it says that
12 Watermaster will not, in any manner, seek to change prior
13 accounting and prior allocation of Safe Yield and operating
14 Safe Yield among the parties to the Judgment for production years
15 prior to July 1, 2014.

16 THE COURT: Thank you. I did make that order. Okay.
17 Anything --

18 MR. DONLAN: Yes. I just want to clear the record.
19 Because this issue was discussed with a special referee in the
20 2000 Post-Order Memorandum, a document that Mr. Slater cited to
21 earlier, and it doesn't comport with his current interpretation
22 of the purpose and intent for the early transfers.

23 First of all, "early transfer" is defined in the
24 Safe Yield Agreement as the reallocation of Safe Yield -- water
25 not produced by the Ag Pool to the Appropriative Pool -- on an
26 annual basis, rather than according to the five-year increment

1 described in the Judgment, which was not mentioned at all in
2 Mr. Slater's argument. The purpose was to reschedule the timing
3 of that from a five-year average to immediate. And Mr. Slater
4 says that to Ms. Schneider in the Post-Order Memorandum dated
5 October 26, 2000. And this is immediately following the order
6 approving the Peace Agreement.

7 Ms. Schneider asked: The Peace Agreement introduced as
8 the new term "early transfer" --

9 THE COURT: Okay. Slow down.

10 MR. DONLAN: I'm sorry.

11 (Court confers with reporter.)

12 THE COURT: Okay. Go ahead.

13 MR. DONLAN: -- when the same accounting might instead
14 have been described in terms of the Judgment's phrase," quote,
15 "reallocation of unused agricultural pool water," end quote --
16 the question is, quote, "Is 'early transfer,' end quote, the same
17 as reallocation of unused agricultural pool water?"

18 This is the entire volume that moves from the 82,8- that
19 is unproduced. Mr. Slater's response or Watermaster's response
20 at the time was, "Early transfer is essentially the same as
21 reallocation of unused agricultural pool of water."

22 For planning purposes, each of the appropriators, many of
23 whom are responsible for preparing and filing Urban Water
24 Management Plans and Watermaster Plans and issuing letters,
25 desire a more formal statement of their relative share of the
26 Chino Basin.

1 There's no mention that this is a separate allocation or
2 entitlement. This is the water moving, in gross, from the
3 unproduced Ag allocation.

4 Mr. Slater also describes in the Post-Order Memorandum
5 the rationale for reducing the early -- the land use conversion
6 claim volume from 2.6 acre-feet per acre to 2.0. It describes it
7 in the Post-Order Memorandum as helping with hydraulic control --
8 that's on page 7 -- and assisting with water quality.

9 Cumulatively, the amendment and operation of the existing
10 additional desalters should provide substantial benefit to
11 Watermaster's goal of maintaining production in the southern part
12 of the basin.

13 At the time of the Peace I Agreement, there were land use
14 conversion claims that had been established. The total volume,
15 if you add an early transfer volume of 32,8- to the unproduced
16 Ag assumption of -- or the produced Ag assumption of 50,000
17 acre-feet would have exceeded in the very first year the amount
18 of water that's to be reallocated to the Appropriative Pool.

19 It's our belief that the intent of the early transfer
20 based on the definitions and what Mr. Slater represented to the
21 special referee at the time was that the early transfer water,
22 which is a timing mechanism to move the water from the unproduced
23 Ag Pool over to the Appropriative Pool without regard to water
24 right priority as set forth in Exhibit H, Schedule 10. That
25 clearly set forth the priorities that you noted repeatedly in
26 your tentative ruling. So I don't think there's an ambiguity.

1 We would argue that there wasn't an ambiguity in 2000.
2 It was very clear how water was to be reallocated. We don't know
3 why the confusion was created in 2007. Jurupa and the City of
4 Chino opposed the amendments to the Watermaster's Rules and
5 Regulations to adopt 6.3(c) at the time. So I just would like to
6 clarify that for the record, Your Honor.

7 THE COURT: Thank you, Mr. Donlan.

8 Mr. Gutierrez?

9 Mr. Kidman, before I go to Mr. Gutierrez --

10 Counsel, I forgot your name. I'm sorry.

11 MR. BUNN: Thomas Bunn, Your Honor.

12 THE COURT: Mr. Bunn. Yes?

13 MR. BUNN: I wonder maybe if I could move over here and
14 see my stuff?

15 THE COURT: Sure.

16 MR. BUNN: I'm Thomas Bunn. I'm the attorney for the
17 City of Pomona. I'd also like to talk about this
18 early-transfer-versus-conversions issue. I'm told that my client
19 has the greatest negative impact from prioritizing conversion
20 over to early transfers, so that's an important issue to me.

21 THE COURT: Okay.

22 MR. BUNN: Let me start with what Mr. Donlan just said.
23 I have no reason to dispute what the parties were doing in 2000.
24 What I want to talk about is what they did in 2007 with the
25 adoption of the amended rules and regulations.

26 As the Court pointed out, Section (a) of those

1 regulations 6.3(a) was not changed by the amendment, and it
2 listed things in order of priority. It's my belief that if you
3 look at the amendment, which is to subsection (c), that that
4 says, "Okay. Fine. But we're going to have a different rule if
5 the unallocated agricultural water is insufficient to provide for
6 all the claims, a different priority rule." And the way that I
7 get there, is by this formula that Mr. Slater referred to. And
8 I'm talking about subsection (c) now.

9 THE COURT: 6.3(c) of the Watermaster Rules and
10 Regulations?

11 MR. BUNN: Yes. The amended ones.

12 THE COURT: Yes.

13 MR. BUNN: It says, "All of the amounts to be made
14 available under 6.3(a) shall be added together." Well, that's
15 the conversions before 2000, the conversions after 2000, and the
16 early transfer. All of those are added together, and each
17 Appropriative Pool member share is determined. And then if
18 there's not enough water, that those shares are reduced pro rata.

19 Well, when you reduce it pro rata, that necessarily means
20 that you're treating conversions and early transfers the same.
21 That's how the math works out.

22 THE COURT: Okay. I understand that.

23 MR. BUNN: So Jurupa says in its paperwork that it can't
24 mean this because that's inconsistent with the Judgment
25 priorities. And it's my position that it modifies the Judgment
26 priorities.

1 THE COURT: But it can't modify the Judgment priorities
2 because the Judgment takes priority. It has to overrule the
3 Watermaster Rules and Regulations.

4 MR. BUNN: Well, in this case the Watermaster Rules and
5 Regulations were specifically approved by court order, by
6 Judge Gunn. And I believe that that can modify the way that
7 we're accounting -- in general, the priority set is not modified.
8 It's only in this specific case when there's not enough water
9 that we're dealing with, and I believe that Judge Gunn's order
10 can -- and I want to make it clear. I'm talking about his 2007
11 order approving the amended rules and regulations. I'm not
12 talking about the 2010 order that was discussed in some of the
13 paperwork and in the Court's tentative ruling.

14 THE COURT: I understand.

15 MR. BUNN: I think there's no reason that you can't
16 modify that judgment, and I also think that Jurupa was too late
17 to contend otherwise. Under the Peace II Agreement, the parties
18 agreeing to Peace II was conditioned on the court order directing
19 Watermaster to proceed in accordance with Resolution 07-05, which
20 included these amended rules and regulations. And there was such
21 an order. And there's also a provision in Peace II that's in
22 Section 4.2, that the parties agreeing not to oppose the matters
23 in the Watermaster Resolution -- which includes this.

24 Finally -- I mean I personally was part of this
25 negotiation to change the priority in the situation where there
26 wasn't enough water. And since the Peace II language was all

1 conditioned on those rules and regulations being approved, I
2 would suggest that invalidating that now casts some doubt on the
3 existence of Peace II and, at the very least, upsets the
4 negotiated balance that led to those arrangements.

5 If, Your Honor, please, I'd also like to address a
6 different subject, which is the Safe Yield Reset.

7 THE COURT: Okay.

8 MR. BUNN: I'm sorry. The Safe Yield accounting
9 because -- and direct the Court back to page 30 of its tentative
10 ruling.

11 THE COURT: Got it.

12 MR. BUNN: So Mr. Slater pointed out that on page 19 of
13 that -- line 19 of that page says, "New Yield includes water
14 produced or pumped by the desalters." And then a few lines
15 below, in subsection (c), it says, "New Yield now includes both
16 desalter operation and induced recharge." And in the Court's
17 conclusion there, comes from the language of Peace I that's
18 quoted in (a) starting on line 10.

19 THE COURT: Uh-huh.

20 MR. BUNN: And I would like to suggest how that paragraph
21 should be interpreted. It does say, "operation of the
22 desalters." But the first part of the sentence says, "proven
23 increases in yield generated by the operation of the desalters."

24 Well, to me, that's another way of saying "desalter
25 induced recharge." It doesn't mean "desalter production." And I
26 think that's where the language here could have been clearer, but

1 I'm pretty sure that was intended.

2 And then there's further confusion because, after "the
3 operation of the desalters," which I contend means "induced
4 recharge," there's a comma. And then it says, "induced
5 recharge," so that makes it look as if induced recharge is
6 something different. But I would suggest to the Court that at
7 the time that was drafted in 2000, we weren't sure what the
8 sources of New Yield might be, and there might have been ways to
9 induced recharge other than the operation of the desalters and
10 that all that is trying to cover the basis.

11 So -- and we know all of this because "yield," in
12 general, refers to water in the basin or going into the basin,
13 not water coming out.

14 THE COURT: And that's where I disagree with you for the
15 reasons I put in there. "Yield" means water coming out, in my
16 view.

17 MR. BUNN: Well, the Judgment defines Safe Yield.

18 THE COURT: Yeah. It says, "Water being pumped."

19 MR. BUNN: Essentially -- I'm paraphrasing here. Maybe
20 we can look up the definition. But it essentially says, "water
21 coming into the basin that can be pumped out again," sustainable.

22 THE COURT: I understand what you told me. I don't
23 agree. But go ahead, please.

24 MR. BUNN: Thank you.

25 Then we get to the Safe Yield Reset Agreement and its
26 treatment of these subjects, and that is in Section 5.2 of the

1 Safe Yield Reset Agreement. It did three things, in my mind:

2 Number one, it defined the desalter induced recharge to
3 be 50 percent of the desalter production. And that was based on
4 the data. That's what it's turned out to be. So that shouldn't
5 be controversial.

6 Number two, it confirmed that, if the desalter induced
7 recharge is New Yield, it can't also be Safe Yield.

8 Now, what does that mean? The Wildermuth methodology for
9 resetting the Safe Yield, which the Court is approving in this
10 reset --

11 THE COURT: Yes?

12 MR. BUNN: -- included all sources of yield to the basin
13 including this desalter induced recharge.

14 But the paragraph in Peace II that says we're going to
15 call it "New Yield" and not "Safe Yield" means that that
16 New Yield number must be subtracted from the Safe Yield, and
17 that's what this agreement does.

18 THE COURT: And I see it differently. I see that
19 New Yield gets its own separate category outside of Safe Yield.

20 MR. BUNN: That's correct.

21 THE COURT: Yes.

22 MR. BUNN: But if the definition of Safe Yield included
23 that New Yield number, you don't want to double count it.

24 THE COURT: Well, that's one of the problems with the
25 Safe Yield Reset Agreement is that it essentially redefines, in
26 the Court's view, New Yield into Safe Yield, which is contrary to

1 the Peace Agreement, which says that New Yield is not to be
2 considered part of the Safe Yield per the term of the
3 Peace Agreement up until 2030.

4 MR. BUNN: Well, New Yield is not the same as Safe Yield.

5 THE COURT: I agree with that part.

6 MR. BUNN: You're correct. It defines New Yield separate
7 from Safe Yield. What I'm saying is because of the methodology
8 needed to come up with the 135-, it lumped those two together.
9 So we need to effectuate that deal that you just talked about by
10 separating the two.

11 THE COURT: Okay. I understand that. But I'm not quite
12 sure --

13 MR. BUNN: And that's why it's subtracted out.

14 THE COURT: Okay. That's the part about the credits, I
15 guess. Is that what you mean from the Peace II to get credit and
16 offset?

17 MR. BUNN: No.

18 THE COURT: No?

19 MR. BUNN: I'm simply saying that I'm effectuating that
20 provision of Peace II that says, "New Yield is not Safe Yield."

21 THE COURT: Okay.

22 MR. BUNN: And since this desalter induced recharge is
23 New Yield, it needs to be subtracted from the 135,000 acre-feet
24 Safe Yield.

25 THE COURT: I take your point. I understand it. I don't
26 agree with it, but I understand that.

1 MR. BUNN: And then once that subtraction is done,
2 Exhibit H to the Judgment, which is this priority scheme that
3 we've been talking about, says that it may need to be made back
4 up from unproduced Ag Pool water. And that's the first priority,
5 ahead of both land use conversions and early transfers.

6 THE COURT: I understand that too. Okay.

7 MR. BUNN: Okay. One other confusing part that the Court
8 did mention in its tentative was in Section 5.2(a) of the
9 Safe Yield Reset Agreement.

10 It says, "For the years 2010 to 2014, the desalter
11 induced recharge would be considered Safe Yield, not New Yield."
12 And the Court properly said in its tentative, "Wait a minute.
13 Peace II said it's considered New Yield, not Safe Yield. This is
14 backward." The Court is correct about that.

15 THE COURT: Okay.

16 MR. BUNN: This was a negotiated provision, and it was
17 related to the other provisions that we had about
18 nonretroactivity.

19 THE COURT: All right.

20 MR. BUNN: This was -- if we had -- and I was a person in
21 the negotiations that said, "No. This should be New Yield. It
22 should be distributed differently." And basically I was
23 convinced that with the Safe Yield Reset and nonretroactivity, I
24 needed to give up on that point. So this was a negotiated deal.

25 And that particular provision actually benefits both
26 Chino and Jurupa to the detriment of my client. So that's why

1 there was a paragraph that looks like it's backwards from the
2 other two. It's all about nonretroactivity.

3 Thank you, Your Honor.

4 THE COURT: Thank you very much.

5 And, Mr. Kidman?

6 MR. KIDMAN: Thank you, Your Honor. I'm Mark Kidman. I
7 represent the Monte Vista Water District. At the outset -- I'll
8 try to be brief. But I want to acknowledge the great diligence
9 that the Court put into these really voluminous submittals that
10 came in and the careful craftsmanship that went into your
11 tentative ruling.

12 THE COURT: Thank you. You're very kind. Thank you.

13 MR. KIDMAN: And it hasn't been mentioned here, but I
14 recognize how difficult that must have been for you during a
15 period of bereavement, and we all -- I'm sure everyone in the
16 room says, "We're sorry for your loss."

17 THE COURT: You're very kind. Thank you. Thank you so
18 much for the condolences. Thank you.

19 MR. KIDMAN: One of the first things I want to say right
20 away is that the Watermaster that we've heard about at length
21 here today is an extension of the Court. Watermaster is not a
22 party to this litigation. And the Court has a little paragraph
23 that I really enjoyed: "This really is litigation." And I think
24 that's important to remember that the parties who joined in
25 Watermaster's motion are parties.

26 And for efficiency sake and for the Court's benefit, not

1 everybody filed their own separate papers on this, but we drafted
2 behind the efforts of Watermaster after Watermaster led the
3 effort to try to come to a resolution of this Safe Yield Reset
4 conundrum.

5 THE COURT: And I'll just note for the record, I see
6 Watermaster strictly as a facilitator, not a party, not an
7 advocate, and it does facilitate the Court's process to have one
8 motion, not however many people joined in the motion -- ten
9 motions that are saying the same thing for the Court to try to
10 figure out.

11 So I want to thank Mr. Slater's office for always
12 taking -- how can I say it? -- facilitating the presentation of
13 issues to the Court on -- I'll say "on behalf of" but only in the
14 very loosest way in place of, perhaps -- I can't think of the
15 right phrasing. Not as an advocate, but as a conduit for the
16 presentation of issues to the Court on behalf of -- saying "on
17 behalf of" makes it sound like an advocate, but it's not.

18 MR. SLATER: Your Honor, we perceive our role as being
19 your master, so we're administering the decree.

20 THE COURT: Thank you. And you're doing it very well,
21 and I want to thank you again. Thank you.

22 Go ahead, please.

23 MR. KIDMAN: I don't think that there's a lot of dispute
24 that it's being done very well.

25 THE COURT: Yes.

26 MR. KIDMAN: However, there's a distinction between --

1 it's like the ham sandwich: The chicken is involved, but the
2 egg is committed. So the Watermaster is involved here, but it's
3 the parties who have skin in the game. And there is what I would
4 say the parties need -- and I can't speak for any of them but my
5 own client. Because in three days, there wasn't time to really
6 work out any kind of a unified response here.

7 But I do have a request for the Court on behalf of my
8 client, one party, and it's sort of a dual request. And I
9 recognize the Court was very clear. You didn't want to get
10 buried with more paper in this process. And there is a sort of a
11 famous passage at the end of a famous water rights case for the
12 second Imperial Irrigation District litigation against State
13 Water Resources Control Board that says, "All things must end,
14 even in the field of water law." So I'm certainly not suggesting
15 that you need more briefing, but I do believe this and would make
16 a dual request:

17 One is that the Court hold its tentative ruling as the
18 tentative for now, today. There was some interexchange with
19 Mr. Slater that the Watermaster maybe should provide some input
20 back to the Court about clarification --

21 THE COURT: And if that --

22 MR. KIDMAN: -- of the tentative.

23 THE COURT: Yes?

24 MR. KIDMAN: So in that vein, I would ask that, in
25 addition to clarification, that the Watermaster should prepare,
26 for the benefit of the Court and for the parties, the ones with

1 the skin in the game, a -- and that should be done on a short
2 return. I hope it wouldn't take a long time -- a report on how
3 the Watermaster will go about the accounting for the change in
4 Safe Yield in light of the rulings relative to the priority of
5 these -- of access to the unused agricultural water and the
6 desalters and New Yield and those things.

7 My client has a concern that there might be a double
8 accounting, maybe in more than one place in the ruling, so we
9 need to make sure about that. I think one of the places where
10 there might be a double accounting is -- as I understood the
11 presentation that was made by Mr. Slater, that the 400,000 is a,
12 in effect, a temporary surplus that's being withdrawn from the
13 basin -- the thought being that that can be done without any
14 permanent harm to the basin or to the water rights of the
15 parties. And so it is a deliberate overdraft or a temporary
16 overdraft. And so that portion of what's been devoted to the
17 desalters is not part of Safe Yield. I'm not sure that's clear
18 in the tentative order.

19 Second place is that I have to agree with Mr. Bunn that
20 there is -- I think, and I don't know. But I think that roughly
21 20,000 acre-feet a year of Santa Ana River underflow or induced
22 recharge in Santa Ana River is part of the 135-. And if that's
23 right, that 20,000 needs to be taken out of the 135-. I don't
24 know if that's right. And so we might be dealing with a
25 Safe Yield here of 115-. And if the other 20,000 a year coming
26 out of the 400- is also part of Safe Yield, we might be down to

1 95-. So we just need some clarification on the accounting from
2 the Watermaster. I believe they can provide that expeditiously
3 to the Court. Of course, I cannot speak for how long, or how
4 long would be reasonable.

5 Now, Mr. Bunn mentioned it, and I will mention this also:
6 We've had a lot of talk about whether the Exhibit H and the Ag
7 land conversion rights and the early conversions -- I guess
8 that's what we called it.

9 THE COURT: Early transfers?

10 MR. KIDMAN: -- early transfers, whether those are lumped
11 together or separate. Okay. The Court has made its ruling. I'm
12 not suggesting it needs to be fixed. There's no acknowledgement
13 that I saw in the tentative that ends an era of declining
14 Safe Yield. The first priority in Exhibit H, Section (10), is
15 the "back fail" of operating Safe Yield. So that might be
16 another area that needs to be affirmed by the Watermaster as far
17 as how the accounting goes.

18 THE COURT: And addressed by the Court.

19 MR. KIDMAN: I'm sorry?

20 THE COURT: And addressed by the Court.

21 MR. KIDMAN: Yes, of course, in a report to the Court
22 that is going to get approved or not by the Court.

23 THE COURT: Right. Okay.

24 MR. KIDMAN: So as I said, we've had three days -- three
25 and a half, if you go to noon today.

26 THE COURT: Okay.

1 MR. KIDMAN: And there has not been a lot of opportunity
2 for discourse among the parties on this. The parties -- some
3 think they can live with it, with the tentative. Some think
4 that, "Well, let's see how it works and then try to get it
5 modified, if necessary." And there are others that think that
6 maybe there ought to be an appeal.

7 One of the things that we know is the Watermaster can't
8 be an appellant because they are not a party. Now, they
9 participated in defending the Court's rules in the Court of
10 Appeal not that long ago.

11 THE COURT: Right.

12 MR. KIDMAN: But that's -- defending the Court's rulings
13 maybe is a logical extension of rules of the Court and on behalf
14 of the parties. But, of course, they cannot be an appellant. So
15 I don't know that there would be any disagreement about that
16 proposition. So -- but all these must end, even in the field of
17 water law. And I don't think any of us might really go running
18 to the Court of Appeal on this.

19 So the best thing to do, in the name of judicial economy,
20 is to take a breath, take time out, make sure how this thing is
21 correctly to be interpreted, and then everybody can see. But
22 rather than going final with the tentative today and then
23 starting the 60 days' notice-of-appeal time clock, I would
24 suggest that's really the better use of judicial time.

25 Thank you very much.

26 THE COURT: Thank you, Mr. Kidman.

1 Mr. Gutierrez?

2 MR. GUTIERREZ: Thank you, Your Honor. I want to be --
3 on behalf of City of Chino, I thank you for several opportunities
4 you gave us. The first was to give us more time to respond to
5 this motion brought by Watermaster and that you listed the page
6 limit, which may be a -- disappointing for all of us, given all
7 the documentation that we produced.

8 THE COURT: As I mentioned, I prefer to have it in
9 writing, and I have no problem taking page limits off all the
10 time. In fact, I'll make it a standing rule right now in the
11 Watermaster case, there is no page limit for the briefing, just
12 so you know.

13 MR. GUTIERREZ: And we also appreciate you gave an
14 opportunity to everyone to submit briefs, which they did. And
15 most parties chose not to. But clearly on the City of Chino's
16 motion for discovery, a lot of people joined in. That's probably
17 because I was trying to do discovery with respect to many of the
18 parties, and they objected. And I understand your ruling, and I
19 appreciate it.

20 Overall, I would say that the City of Chino is very
21 satisfied with your ruling. We will embrace it, and we'll work
22 with the parties to implement your ruling. But I also think it's
23 important for me to respond. I wasn't really planning to do much
24 of a response. But given all of the things that have been said,
25 I would like to respond, if I may.

26 THE COURT: Of course.

1 MR. GUTIERREZ: I don't know if I can get it done before
2 4:30.

3 THE COURT: Well, I believe we can stay until 5:00.

4 MR. GUTIERREZ: Great. Thank you.

5 (A discussion was held off the record between the
6 Court and counsel and court staff.)

7 THE COURT: Back on the record.

8 Mr. Gutierrez is addressing the Court.

9 I'll indicate for the record it's 4:17. Counsel and the
10 Court and staff is fine working until 5:00.

11 There was a question having to do if Mr. Gutierrez's
12 argument takes until 5:00 o'clock, if others will be foreclosed
13 from presenting an argument, the answer is, no.

14 But I was also going to indicate a tentative to grant
15 Mr. Kidman's request, that I hold the tentative for today and ask
16 Watermaster, with respect to giving the Court some additional
17 information that Mr. Kidman identified, namely, how the Court's
18 tentative will result in an accounting to avoid a double
19 accounting and how -- and an issue raised by Mr. Bunn with
20 respect to how the induced recharge relates to Safe Yield -- I
21 believe I stated that correctly -- and the Court's addressing an
22 issue with respect to the conversion rights set forth in
23 Exhibit H having to do with the first priority being operating
24 Safe Yield. I believe I've covered the issues.

25 Did I cover the issues, Mr. Kidman?

26 MR. KIDMAN: Yes. Thank you, Your Honor.

1 THE COURT: Thank you.

2 So even if we go until 5:00, first, you'll have -- I can
3 reset the additional hearing on the tentatives.

4 And then, second, I'm going to have additional briefing,
5 and the Court's tentatives will not be final today. And I'll set
6 an additional hearing where everyone will have additional time.
7 I'll set it at 8:30 a.m. on a Saturday, and we can all spend
8 Saturday here.

9 Thanks for laughing.

10 All right. We'll set it for an additional hearing and
11 allot more time for additional oral argument before issuing final
12 rulings.

13 So, Mr. Gutierrez, go ahead.

14 MR. GUTIERREZ: Well, Your Honor, I was actually going to
15 object to Mr. Kidman's request because -- and it doesn't matter
16 now that you --

17 THE COURT: No. As a tentative; as a tentative.

18 MR. GUTIERREZ: -- but -- but --

19 So here is my objection to the request.

20 THE COURT: Okay?

21 MR. GUTIERREZ: I mean, you gave everybody an opportunity
22 to file briefs.

23 THE COURT: I did.

24 MR. GUTIERREZ: Obviously the parties chose not to, and
25 I'm just hearing from Mr. Kidman, and then lawyers got together
26 behind Mr. Slater and cobbled together what they've produced, so

1 they've been involved. And clearly on the discovery motions, the
2 parties filed papers, and City of Chino responded to what's
3 filed. Now, we're being put in a situation where we are going to
4 have to respond further, possibly?

5 So if the Court is going to do that, I request to just
6 defer my argument until the rest of the briefs come in, and then
7 I can address them all.

8 THE COURT: I'm going to do this and here is why: The
9 issues were so complicated in this hearing in the Safe Yield
10 Reset Agreement. And with the Court's learning curve, with
11 respect to identifying and understanding the issues involved and
12 the Court's tentative so lengthy, that a reexamination, in the
13 Court's view, would be appropriate.

14 And I tried to cover everything, but there were so many
15 things, I believed there were some open areas I should address.
16 And the best time and place to do that would be in the context of
17 this motion.

18 MR. GUTIERREZ: I think that makes perfect sense. But if
19 you would, I'd prefer just to defer my argument then until we do
20 that.

21 THE COURT: That would be fine.

22 Mr. Donlan?

23 MR. DONLAN: Yes, Your Honor. I would just like to add
24 that we too would prefer that you adopt the tentative as a final
25 ruling and then order Watermaster to go back and look at the
26 issues that you've identified.

1 The concern that I have is if you send Watermaster back
2 now with the parties, we don't have clear ground rules about how
3 you're thinking about this. And you could get anything back.

4 THE COURT: Okay.

5 MR. DONLAN: I think providing some guidance now by
6 finalizing your order now would be helpful.

7 THE COURT: That's why I tried to identify the issues.

8 Mr. Kidman?

9 MR. KIDMAN: If I didn't make it clear, let me make clear
10 what I was hoping about what you're thinking, Your Honor. I'm
11 thinking no more briefing, just a report from the Watermaster,
12 "How is this going to work?" And so that everybody can see it,
13 and the Court can modify it if it finds there's things that need
14 to be changed in the tentative, but I wasn't suggesting more
15 briefing.

16 THE COURT: I appreciate that. What usually happens,
17 Mr. Kidman, in the Court's view, is once I start this process,
18 it's not a restart, believe me. Because the foundation of the
19 tentative rulings that I've made, I have not heard a reason to
20 change at this point. But there are unanswered issues that
21 Mr. Kidman raised with respect to the tentative rulings that the
22 Court would like to address. And the best way for the Court
23 to do that is to use the "B" word, briefing.

24 And I appreciate, Mr. Donlan, that you would prefer the
25 Court to stand on its tentative today, but I believe, as
26 Mr. Kidman has suggested, the best use of everyone's time is to

1 try to get as thorough, complete, and correct as I can the first
2 time, rather than issue a tentative that goes up on appeal.

3 And it's a year later, there are unanswered issues, and
4 it comes back to me, and I try to answer them a year from now
5 when I'm a year distant from the amount of work that I've put in
6 on the case up to today. So for those reasons, I'm not going
7 to -- I'm going to overrule your objection. Okay?

8 MR. DONLAN: And, Your Honor, excuse me. I'm sorry. I
9 just would like to ask for clarification about what you're asking
10 for.

11 THE COURT: Absolutely. That's perfectly reasonable, and
12 that's what I'm going to try to frame. Okay?

13 And rather than think out loud, always dangerous, I'm
14 going to go off the record and have a short discussion with
15 counsel to actually frame the issues appropriately. So I'm not
16 revisiting the issues that I've done already, but focusing on
17 something new and different and not -- and I will state I'm not
18 reopening briefing on the issues that I've ruled already. That,
19 as I mentioned in my cover memo, that briefing is closed.

20 So let's go off the record and see if we can identify
21 these issues maybe with Mr. Kidman's help and Mr. Slater's help,
22 Mr. Donlan, Mr. Gutierrez -- anybody else who wants to chip in at
23 this time.

24 (Proceedings were held off the record at the
25 discretion of the Court.)

26 THE COURT: Back on the record.

1 So we're back on the record. The Court conferred with
2 counsel with respect to some additional processes the Court has
3 available with respect to questions regarding the Court's
4 tentatives, and the Court is going to grant some additional time
5 and follow the following procedure.

6 But before I do so, I'm going to identify a couple of
7 items that are not -- that the Court, at the current time, is not
8 going to reconsider or have parties doing additional questioning,
9 and that is with respect to the order of priority and with
10 respect to the Court's failure to grant the Safe Storage
11 Management Measures; however, the Court is going to set a date
12 for parties to submit to the Court a list of questions, no
13 briefing, just questions for clarification regarding the Court's
14 tentative decision sent out September 21, 2016, under the cover
15 "Notice of Service of Tentative Orders" by Mr. Slater's office.

16 And I'm going to set that for everyone to serve everyone
17 else -- or I should say for the questions to be filed through the
18 procedure with Mr. Hubsch in about two weeks from today, October
19 the 7th. Is that too much time? too little time?

20 MR. GUTIERREZ: That's sufficient time.

21 THE COURT: Okay.

22 MR. SLATER: Yes, Your Honor.

23 THE COURT: Three weeks could be okay.

24 MR. SLATER: Two weeks is fine, Your Honor.

25 MR. DONLAN: That's fine.

26 THE COURT: Okay. Two weeks. Because everyone is on top

1 of this right now, and I think a shorter deadline is better to
2 move people forward.

3 Then I'll set an additional date actually three weeks
4 after that to allow time for mailing and service and
5 consideration for October 28th for people to respond to the list
6 of questions that have been proposed, in other words, whether --
7 how the parties think the first round of questions is appropriate
8 or irrelevant or something the Court doesn't need to answer.

9 The Court will then pick a date to send out a list of
10 questions for responses by the parties, and the Court will do
11 that -- given the fact that we're looking in November, and I'm
12 gone part of this time -- for December the 2nd is when I'm going
13 to send them out.

14 And I'll set a briefing in the order with respect to
15 identification of additional questions, a little bit like I did
16 in the briefing schedule. I'll set a briefing schedule in that.
17 But, believe me, it will be extensive enough that I'm not going
18 to cramp anybody's holidays in December. There will be ample
19 time for everyone to brief and respond, and we'll probably set a
20 hearing on this, my guess, sometime in February or March of next
21 year.

22 But is that clear enough for everyone with which to
23 comply? I see Mr. Gutierrez nodding his head.

24 Mr. Slater, okay?

25 MR. SLATER: Yes, Your Honor.

26 THE COURT: Mr. Donlan?

1 MR. DONLAN: Yes.

2 THE COURT: Mr. Fudacz?

3 MR. FUDACZ: Fudacz. That's fine with us, Your Honor.

4 THE COURT: Okay.

5 All right. Mr. Kidman?

6 MR. KIDMAN: Yes, sir.

7 THE COURT: All right. Any other comments, suggestions?

8 Oh, and I also need to identify --

9 Counsel, could I get your name please in the back?

10 MS. EGOSCUE: Yes, Your Honor?

11 THE COURT: Oh, your name. Yes?

12 MS. EGOSCUE: Ms. Egoscue on behalf of Ag Pool.

13 THE COURT: Thanks. You also made a contribution.

14 And in the back, sir?

15 MR. GARCIA: Garcia. Paeter Garcia.

16 THE COURT: Mr. Garcia also made a suggestion for the
17 Court to indicate that oral argument with respect to the issues
18 raised by the tentative is not foreclosed.

19 The Court will have a complete oral argument before it
20 issues a final ruling in this matter, and we'll schedule that
21 appearance at the appropriate time.

22 I think I've covered all of the issues raised today.

23 Any issues I failed to cover? I hope none. Okay. None.

24 Thank you, everyone --

25 MR. SLATER: Thank you, Your Honor.

26 THE COURT: -- for your willingness -- patience and

1 willingnes with me and each other.

2 Thank you very much.

3 (Proceedings in the above-entitled matter
4 were concluded.)

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