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CITY of CHINO

June 14, 2017

Board of Directors
Advisory Committee
Pool Committees
Chino Basin Watermaster
9641 San Bernardino Road
Rancho Cucamonga, CA 91730

Subject: Tolling Agreement

On Thursday, June 8, 2017, the Appropriative Pool Committee, in a closed session discussion, considered a proposed tolling agreement between the Overlying Agricultural Pool and the Appropriative Pool. The verbal report out of the closed session provided by Appropriative Pool Counsel John Schatz, indicated that the Appropriative Pool Committee, by majority vote (the cities of Chino and Ontario opposed) approved the proposed tolling agreement, and that the cities of Chino and Ontario, who did not support the agreement, would provide for the record, correspondence describing their respective positions.

The City of Chino does not approve the tolling agreement and does not provide authorization to the Appropriative Pool Committee to enter into a tolling agreement with respect to the Agricultural Pool's Contests pertaining to applications for Excess Carry-Over Local Storage, or for Sale or Transfer transactions involving Excess Carry-Over, on Chino's behalf.

The Appropriative Pool lacks the authority to waive the rights of Appropriators, such as Chino, to the Watermaster's and Agricultural Pool's obligation to process the Agricultural Pool's "Contests" (assuming the Contests are valid) within the specified 180 day period according to Watermaster rules. Also, the Appropriative Pool lacks the authority to agree to a requirement for the Appropriative Pool to hold 130,000 acre-feet of stored water in-reserve that would not be produced for the term of the tolling agreement. And, Appropriators have a priority right to store their Excess Carry-Over, with an expectation that they may also have access to it, once stored.

Additionally, the City of Chino objects to the Agricultural Pool's Contests because the Contests lack merit, as outlined in the City's May 24, 2017 letter addressed to the Watermaster Board of Directors (copy attached).

Respectfully,

David G. Crosley, P.E.
Water & Environmental Manager

Attachment: Chino May 24, 2017 letter to Watermaster Board Members
Cc: Peter Kavounas, Chino Basin Watermaster General Manager
Anna Truong, Chino Basin Watermaster Board Clerk
Todd Corbin, Appropriative Pool Committee Chairperson
Bob Feenstra, Agricultural Pool Committee Chairperson
Matthew C. Ballantyne, City Manager
Chino City Council



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May 24, 2017

James V. Curatalo, Jr., *Chair*
Robert DiPrimio, *Vice-Chair*
Bob Kuhn
Robert Bowcock
Steve Ellie
Gino Filippi
Donald D. Galleano
Paul Hofer
Geoffrey Vanden Heuvel

Watermaster Board Members
Chino Basin Watermaster
9641 San Bernardino Road
Rancho Cucamonga, CA 91730

Re: Agricultural Pool "Contest" to Watermaster's Storage Agreement with City of Chino

Dear President and Board Members

The City of Chino hereby objects to the Agricultural Pool's attempted Contest to the proposed storage agreement between Watermaster and the City of Chino.

The City of Chino requests the Watermaster Board to reject the attempted Contest by the Agricultural Pool without any further proceeding based on the grounds set forth in this letter.

The City of Chino also requests that Watermaster Board members Paul Hofer and Geoffrey Vanden Heuvel be recused from ruling on this objection, because they are conflicted due to their membership in the Agricultural Pool and their representation of the Agricultural Pool on the Watermaster Board. In fact, a prior proposal to limit production of water held in storage by the appropriators was advanced by Board Member Vanden Heuvel. His rationale is central to the attempted Contest. His rationale constitutes a bias in ruling on this objection to the Agricultural Pool's attempted Contest.

BACKGROUND

Every year, Watermaster approves an Assessment Package, which confirms the amount of each Party's excess Carry-Over and Supplemental Water in the basin.

On November 17, 2016, the Watermaster Board approved the requests of the appropriators to store 279,757.153 AF of excess Carry-Over Water and 144,012.166 AF of Supplemental Water in the 2016-2017 Assessment Package. The Agricultural Pool unanimously approved the same Assessment Package on November 10, 2016.

On February 3, 2017, Watermaster gave notice that it would consider applications for Local Storage Agreements from members of the Appropriative Pool and the Overlying Non-Agricultural Pool to store excess Carry-Over Water and Supplemental Water in the amounts shown in the Assessment Package approved on November 17, 2016, which are detailed above. The Notice reminded the Parties that Watermaster must find that there is "*no material physical injury*" and approve the storage agreements in the absence of contrary evidence that overcomes the rebuttable presumption in Section 5.2(b)(v) of the Peace Agreement. The Notice also stated that Watermaster staff was unaware of any evidence that the storage agreements would cause material physical injury and that it would go before the Watermaster Board on March 23, 2017.

Watermaster's Notice was accompanied by a Staff Report entitled "Summary and Analysis of Proposed Local Storage Agreements" dated February 3, 2017 and the Application of the Non-Agricultural and Appropriative Pool Parties with Stored Water Accounts dated February 1, 2017. The Staff Report recommended the approval of the storage agreements. The Staff Report stated that Watermaster had consistently tracked water in storage accounts and recognized the stored water in the annual Assessment Packages. The Staff Report also stated that Watermaster had prepared standard storage agreements for each type of account and that "*the agreements would cover the amount of water that each account holder had in each account, shown in the latest approved annual Assessment Package.*"

On February 9, 2017, a proposed amendment to the standard storage agreement was presented to the three pools. The Watermaster Staff Report for the pool meetings acknowledged that the pools, Advisory Committee and Watermaster Board have directed Watermaster staff to process applications for storage in the absence of storage agreements and to continue to track the water held in storage "*as if there were a valid storage agreement*" until such time as the matter of storage agreements could be uniformly resolved. It recommended the approval of the revised storage agreement – Form 8. At its pool meeting, the Agricultural Pool voted not to approve the storage agreements of the Parties "until there is sufficient feedback from the Court and quantifiable information regarding the Safe Yield reset."

On May 3, 2017, the Agricultural Pool submitted an attempted Contest to the storage agreements of the Parties in reliance on Watermaster Rule 10.13. The Agricultural Pool describes the scope of its Contest as follows:

The Ag Pool contests the application for Storage of Excess Carryover Water by members of the Appropriative Pool in amounts as shown in the Assessment Package Approved November 17, 2016. [Page 2].

Substantively, the Agricultural Pool has not presented evidence that overcomes the presumption that the approval of the storage agreements will not result in Material Physical Injury to a Party to the Judgment or the Basin contained in Section 5.2(b)(v) of the Peace Agreement. Instead, the Agricultural Pool shifts its burden to present evidence onto Watermaster as follows:

Watermaster has not determined whether the allocation and use of storage of the proposed Local Storage Agreements for Excess Carryover by Members of the Appropriative Pool are in excess of safe storage capacity requiring that mitigation be defined and resources committed to mitigation prior to allocation and use. Because a Safe Storage Management Plan or other appropriate mitigation has not been established, in light of evidence from Watermaster's Engineer, including modeling and other technical documents, the proposed Local Storage Agreements present a Material Physical Injury to the Chino Basin requiring a plan for mitigation.

Clearly, the Agricultural Pool does not show Material Physical Injury to the Basin and faults Watermaster for failing to determine that the water in storage accounts exceeds the safe storage capacity of the basin. The Agricultural Pool's argument is not evidence and it does not show injury to the Basin. If the Agricultural Pool claims that the Safe Storage Capacity of 600,000 AF will be exceeded, the Agricultural Pool fails to offer evidence of that fact.

The Agricultural Pool also argues that the approval of the appropriators' Excess Carry-Over Water is procedurally flawed — despite the Agricultural Pool's prior approvals of the storage of that water. Furthermore, the alleged flaw is not the standard. The standard is Material Physical Injury and the Agricultural Pool is estopped from challenging the appropriator's storage rights, because it voted to approve the Assessment Packages and failed to challenge them in court.

The Agricultural Pool contests the storage agreements and seeks their denial until a mitigation plan is developed. The Agricultural Pool "puts the cart before the horse" by requesting denial of the agreements before producing evidence that Material Physical Injury to the Basin will result.

THE AGRICULTURAL POOL'S ATTEMPTED CONTEST MUST BE REJECTED

The attempted Contest must be rejected on the following grounds:

1. The Agricultural Pool Does Not Have the Right to Contest the Storage Agreements

The Agricultural Pool is not permitted to bring a Contest that challenges the appropriators' right to store their excess Carry-Over Water under Article X of the Watermaster Rules, because the Agricultural Pool is not a Party to the Judgment.

Watermaster Rule 10.6 confirms the appropriators' right to store their un-Produced Carry-Over Water and requires appropriators to request Watermaster's approval of a storage agreement. Watermaster Rule 10.13 permits a Party to the Judgment to contest an appropriator's application to store its Excess Carry-Over Water; but the procedure is not available to the Agricultural Pool.

The Agricultural Pool cannot contest the Storage Agreement between Watermaster and an

appropriator such as the City of Chino, because the Agricultural Pool is not a Party to the Judgment. The Agricultural Pool was not a Party to the Judgment but a creation of the Judgment. Paragraph 38(a) of the Judgment gives the pools *"the power and responsibility for developing policy recommendations for administration of its particular pool."* Paragraph 43 of the Judgment establishes the pools *"for Watermaster administration of, and for the allocation of responsibility for, and payment of, costs of replenishment water and other aspects of the Physical Solution."*

"Exhibit H" of the Judgment gives an appropriator the right to store its unproduced water and to execute a storage agreement with Watermaster. "Exhibit I" of the Judgment tasks the Agricultural Pool with providing funds for replenishment of any production in excess of its share of the Safe Yield. Neither Exhibit authorizes the Agricultural Pool to challenge, and thereby limit, the appropriators' right to store their unproduced water.

Indeed, no part of Judgment makes the pools Parties nor authorizes the pools to challenge the right of the appropriators to store their unproduced water

Similarly, Paragraph 5.2(b)(vi) of the Peace Agreement permits a Party to the Judgment to object to a Local Storage Agreement; but it does not permit a pool to object to such an agreement.

For these reasons, the Agricultural Pool's "contest" to the proposed storage agreement between Watermaster and the appropriators such as the City of Chino must be rejected at the outset.

2. The Agricultural Pool Waived its Right to Judicial Review of the Appropriator's Storage Rights Recognized by the Annual Assessment Packages

For years, appropriators with excess carry-over water have requested to store their unproduced water. Then, the pools including the Agricultural Pool have consented to each of those requests. Thereafter, the Watermaster Board has granted those requests in approving the annual Assessment Packages.

On November 17, 2016, the Watermaster Board approved the requests of the appropriators to store 279,757.153 AF of excess Carry-Over Water and 144,012.166 AF of Supplemental Water in the 2016-2017 Assessment Package. [Pages 3A, 4A]. The minutes of that Watermaster Board Meeting show that the Assessment Package was approved by all Board Members present including the Agricultural Pool's representative Geoffrey Vanden Heuvel. The staff report for the Assessment Package indicates that the Assessment Package had been approved by the pools including the unanimous approval of the Agricultural Pool on November 10, 2016.

Now, the Agricultural Pool seeks to challenge the proposed Storage Agreements between Watermaster and the appropriators, which would confirm the prior approval of the appropriators' storage of their excess Carry-Over Water and Supplemental Water by the Watermaster Board on November 17, 2016.

In effect, the Agricultural Pool's attempted Contest is asking the Watermaster Board to reconsider what it approved six months ago. The Agricultural Pool cannot do so, because it voted to approve the storage and waived its right under Paragraph 31 of the Judgment by failing

to bring a judicial challenge to Watermaster's November 17, 2016 approval of the appropriators' storage rights.

Under Paragraph 31, a pool has the right to seek judicial review of an action or decision of the Watermaster by filing a motion within 90 days of a Watermaster action or decision. However, the Agricultural Pool did not file a motion that challenged the Watermaster's approval of the appropriators' storage rights contained in the 2016/2017 Assessment Package or other such prior approvals. It cannot revive that right by filing an attempted Contest.

Although Watermaster delayed in providing storage agreements to the appropriators to execute, Watermaster performed its function under Rule 8.1(e) to "*keep an accounting of Carry-Over Water in connection with said Carry-Over Rights.*" Watermaster performed it by adopting Assessment Packages annually, which contain the accounting for the excess Carry-Over Water of the appropriators.

The fact that Watermaster had not provided storage agreements for the appropriators to execute until now is immaterial, because Watermaster performed its required accounting function and approved the amounts of appropriators' Excess Carry-Over and Supplemental Water in the annual Assessment Packages. In addition, Watermaster's delay in providing storage agreements to the appropriators precludes the argument that the appropriators have not executed such agreements. The reality is that the appropriators provided information about their unproduced water to Watermaster and Watermaster accounted for it in the annual Assessment Packages. This reality is substantial performance.

3. The Agricultural Pool Cannot Seek to Withdraw Approval of Water in Storage Accounts

The Agricultural Pool's attempted Contest seeks to withdraw the approval of the Excess Carry-Over Water in the Appropriators' storage accounts contained in the Assessment Packages. However, the Agricultural Pool does not seek to withdraw the approval of the Appropriators' obligation to pay the Agricultural Pool's assessments contained in the Assessment Packages. The Agricultural Pool cannot have it both ways.

In addition, the Agricultural Pool would undo the results of a collaborative process that proceeds from the Judgment and results in certainty about the rights of the Parties to their fair share of the Safe Yield and the obligations of the Parties to pay Watermaster assessments.

The Agricultural Pool asks Watermaster to undo the allocations of the Appropriators' right to their fair share of the Safe Yield that were made as long as a decade ago, if not longer. These are allocations that have been studied and approved by the Watermaster Board, the Advisory Committee and the three pools. These are allocations upon which the appropriators have relied to plan their future water needs and, in some cases their revenues. Furthermore, these allocations have been approved without objection and without a finding of Material Physical Injury since the approval of the Peace Agreement in 2000.

The Agricultural Pool cannot be permitted to cancel the Excess Carry-Over Water in the Appropriators' storage accounts and retain the benefit of the Appropriators' payments of the Agricultural Pool's Watermaster assessments.

4. The Agricultural Pool Does Not Show Material Physical Injury

As stated in the Background, the Agricultural Pool fails to meet its burden of producing evidence that Material Physical Injury to the basin will result from the approval of the storage agreements – particularly where all of the Excess Carry-Over Water in the Appropriators' storage accounts has been approved in the Assessment Packages without any evidence of Material Physical Injury.

The Agricultural Pool's attempted Contest submits arguments – not evidence.

Here is what it argues:

1. Under the caption "Modeling Evidence of the Impact of Storage on the Basin and Material Physical Injury" at pages 5 and 6, there are assertions of varying amounts of over-drafts between 1978 and 2010 and projections of further over-drafts through 2045. However, the support for these assertions is not reflected in the attachments. There is also an assertion that portions of the past over-drafts were unexpected or unauthorized. However, the meaning of those terms is not provided and no evidence is provided about whether the past over-drafts were authorized by Watermaster. There is an assertion that the over-drafts will result in drops in water levels but no evidence about the nexus between the two is provided. Finally, there is no statement or evidence that the alleged drop in water levels constitutes a Material Physical Injury. To the contrary, at the September 16, 2014 Board Workshop, WEI produced a handout stating that "*Lowering the water table alone may not be adverse or undesirable*" on page 6 of the handout.
2. Under the caption "Watermaster Board September 16, 2014 Workshop" at page 6, Mark Wildermuth allegedly stated that recharge was greater than the Safe Yield until the mid-1990's and that recharge was less than the Safe Yield thereafter. There is reference to a chart for the Workshop that shows the recharge between 2001 and 2013 was less than the Safe Yield in the amount of 184,000 AF. There is also an allegation that some of the 184,000 AF amount was placed into storage without showing the exact amount and how that amount was determined. It ends by criticizing Watermaster for failing to address the impacts of storage, yet those impacts are not identified. Finally, it does not show how such unidentified impacts constitute Material Physical Injury.
3. Under the caption "Wildermuth's Safe Storage Memorandum" at page 6, it refers to Attachment F to the 2015 Safe Yield Reset Agreement that was rejected by the Court. The essence of the reference is merely that water recharged to the Basin between 2000 and 2014 was less than the Safe Yield amount of 140,000 AF. However, the reference is not evidence that the disparity does not constitute Material Physical Injury. Furthermore, the allocations of the Safe Yield in this period were authorized by the Judgment and the various Assessment Package approvals; and such legal allocations do not constitute Material Physical Injury.
4. Under the caption "Wildermuth's 2013 Chino Basin Groundwater Model Update" at pages 7 and 8, it repeats a similar disparity between the water actually recharged to the basin between 2001 and 2011 and the Safe Yield of 140,000 AFY allocated under the Judgment and approved in the Assessment Packages. It then states that 107,232 AF of Safe Yield was allocated without a corresponding amount of recharge; but it does not present evidence about the portion of that amount, if any, that was placed in storage. As shown above, such

allocations of the Safe Yield were authorized by the Judgment and the various Assessment Package approvals; and such legal allocations do not constitute Material Physical Injury. It then refers to a statement from the WEI "Final Report" that water levels may decline after 2030 but fails to equate those to Material Physical Injury. The Agricultural Pool contends that WEI stated that Material Physical Injury will result but WEI does not make that statement.

5. Under the caption "Insufficiency of Storage Applications Staff Report and Support" at page 8, it criticizes Watermaster Staff for not providing evidence of Material Physical Injury. It misses the point. The burden of producing evidence of Material Physical Injury resulting from the approval of the storage agreements is on the Agricultural Pool. It ends by arguing that (a) an unspecified amount of water in storage is "not representative of physical water" which apparently means that there is no corresponding recharge for such stored water, (b) the recovery of such stored water "will result in a relative water level decline" and (c) such declines in water levels will result in Material Physical Injury. However, the Agricultural Pool fails to provide evidence about the exact amount of the water in storage that lacks a corresponding amount of recharge, the amount and location of the water level declines and the nature of the Material Physical Injury. Furthermore, the Agricultural Pool ignores the fact that allocations of the Safe Yield to storage were authorized by the Judgment and the various Assessment Package approvals and that those legal allocations do not constitute Material Physical Injury.
6. Under the caption "SYRA and Storage Management" at page 8, it again shifts its burden to Watermaster to evaluate the impact of the production of stored water allegedly not having a corresponding amount of recharge. Thus, it acknowledges that the evidence about that impact, if any, does not exist. Nevertheless, it argues that the storage agreements should not be approved.

While the Agricultural Pool alludes to evidence of Material Physical Injury, it clearly fails to produce it and acknowledges that it does not exist by its request that Watermaster develop such evidence. Watermaster Rule 10.14(e) permits the Watermaster Board to "*reject the Contest and deny the request for hearing*" if it finds that the attempted Contest fails to specify a Material Physical Injury.

The Agricultural Pool's attempted Contest lacks merit, because it has failed to meet its burden of producing evidence of Material Physical Injury. In fact, the Agricultural Pool agrees with the Watermaster Staff that such evidence does not exist. Its attempted Contest should be rejected and no hearing should be held.

THE WATERMASTER BOARD CANNOT PROCEED WITH THE CONTEST

Because the attempted Contest to the storage agreements includes all of the water in the storage accounts of the Appropriators allocated in the 2016/2017 Assessment Package that were approved by the Watermaster Board on the November 16, 2016, the Watermaster Board is collaterally estopped from reconsidering those allocations. It is a fact that those allocations have been approved by the Watermaster Board. It also is a fact that those allocations have not been judicially challenged in the prescribed time.

Therefore, Watermaster may not legally cancel those allocations of water in the appropriators' storage accounts. Furthermore, the reconsideration of those allocations would open further challenges to other approvals in the Assessment Package. This is not a recipe for stability, predictability and integrity expected from the Watermaster Board.

BOARD MEMBERS HOFER AND VANDEN HUEVEL MUST BE RECUSED

The attempted Contest is filed by the Agricultural Pool that is represented on the Watermaster Board by Paul Hofer and Geoffrey Vanden Huevel. Since these gentlemen are active members of the Agricultural Pool, they are inseparably wedded to the position asserted by the Agricultural Pool in the attempted Contest. Further, Mr. Vanden Huevel's prior advocacy for a limit on the production of water held in storage by the Appropriators clearly creates a bias in favor of the attempted Contest and against this Objection.

In the attempted Contest, the Agricultural Pool seeks to cancel the water previously allocated to the Appropriator's storage accounts by advocating that the Watermaster Board refuse to approve the proposed storage agreements between Watermaster and the Appropriators.

The bias of Watermaster Board Members Paul Hofer and Geoffrey Vanden Huevel is too clear; and it cannot be ignored.

For the reasons set forth in this letter, the City of Chino requests the Watermaster Board to reject the attempted Contest of the Agricultural Pool and also requests the Watermaster Board to approve the proposed storage agreements between Watermaster and the City of Chino.

Respectfully submitted


Jimmy L. Gutierrez
Counsel to the City of Chino