



1 RIVERSIDE, CALIFORNIA; SEPTEMBER 9, 2005

2 DEPARTMENT 3

JUDGE ERIK MICHAEL KAISER

3  
4 THE COURT: City of Barstow versus City of  
5 Adelanto.

6 MR. BRUNICK: Good morning, your Honor. Bill  
7 Brunick appearing for Mojave Water Agency.

8 MR. VON HAAM: Good morning, your Honor. Peter  
9 Von Haam on behalf of the Department of Fish and Game.

10 THE COURT: I have read the Mojave Water  
11 Agency's supplemental report, and let's see, the  
12 attachments thereto, which included the Watermaster's  
13 report, the Baja Subarea Advisory Committee Alternative  
14 Proposal for Rampdown, California Department of Fish and  
15 Game language.

16 After reading the report, Mr. Brunick, it was  
17 my intent to go along with the Mojave Water Agency's  
18 recommendation with the addition of the California  
19 Department of Fish and Game proposal.

20 Do you wish to be heard?

21 MR. BRUNICK: Does that --

22 THE COURT: I think it's a better approach to  
23 if there's a problem that we have a review process within  
24 the 10 years.

25 MR. BRUNICK: The judgment -- once again, the  
26 judgment requires that we recommend 75 percent without  
27 all the bells and whistles.

28 THE COURT: Right.

1 MR. BRUNICK: The Subarea Advisory Committee  
2 and the Mojave Water Agency were careful to come up with  
3 additional proposals that they felt were needed in the  
4 community at the Court's direction. The agency can  
5 implement those proposals, and I think the Baja Subarea  
6 Advisory Committee is expecting the Court to order those  
7 alternatives, and we certainly would -- can live and  
8 administer that, those alternatives --

9 THE COURT: The alternatives.

10 MR. BRUNICK: -- that are attached.

11 THE COURT: Okay. Which ones do you mean, the  
12 Watermaster's or -- I mean the Fish and Game?

13 MR. BRUNICK: No. The -- if you look on the  
14 Baja Area -- Subarea Advisory Committee recommendations  
15 on the proposal, they had suggested an alternative  
16 rampdown which would take us to 75 percent.

17 There are some suggestions on carryover, and  
18 transferability, and so on, and provide 10 years of -- a  
19 10-year window period, and we can come back to the Court  
20 on an annual basis when we make our report and report to  
21 the Court an updated as to the existing conditions in  
22 Baja.

23 But I think the Advisory Subarea Committee  
24 feels that, along with the position to go to 75 percent  
25 for a 10-year period, they want the other attachments.

26 THE COURT: Okay. Well, I thought your  
27 recommendation was -- maybe I misread your Points and  
28 Authorities. I thought you were maybe not recommending

1 but in favor of the subcommittee's alternative with Fish  
2 and Game.

3 MR. BRUNICK: We certainly can live with the  
4 Subarea Advisory Committee's recommendation, absolutely.

5 THE COURT: I wasn't clear as to what I was --

6 MR. BRUNICK: No, that's correct.

7 THE COURT: I'm sorry, I apologize.

8 MR. BRUNICK: The judgment says -- our board is  
9 very much concerned that the judgment says recommend to  
10 the Court 75 percent without the bells and whistles.

11 THE COURT: Okay.

12 MR. BRUNICK: We have worked with these folks  
13 to come up with the alternative at the Court's direction.  
14 We can implement what the Subarea Advisory Committee has  
15 suggested, and we will implement that if the Court so  
16 orders.

17 THE COURT: I'll make it clear, because I  
18 didn't -- the Court would adopt the Alternative Proposal  
19 for Rampdown, as suggested by the Baja Subarea Advisory  
20 Committee, along with the language asked for by the Fish  
21 and Game.

22 So if you'll prepare that judgment?

23 MR. BRUNICK: I will prepare that order.

24 THE COURT: I apologize --

25 MR. BRUNICK: No.

26 THE COURT: -- Mr. Brunick.

27 MR. BRUNICK: It's -- this has been going  
28 on -- I think you were referring to us, as the --

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THE COURT: Right.

MR. BRUNICK: It's been going on, but I think this brings us a solution.

THE COURT: Okay. Well, I don't see anybody too upset, so I guess everybody's equally unhappy.

MR. BRUNICK: Thank you, your Honor, very much.

THE COURT: You're welcome. If I had know it was going to be that quick, I'd have taken you first.

MR. CRUISER: Your Honor?

THE COURT: Yes, sir.

MR. CRUISER: I'm from the lakes were fishing is. My name is Bob Cruiser (phonetic). I'm an owner at Wet Set, Inc., one of the recreational lakes. And I just wanted to be heard with respect to the Fish and Game edition.

THE COURT: All right. If you just walk up over here and use the microphone, sir.

MR. CRUISER: Thank you, your Honor.

First of all, we got together with the Subarea Committee, and we came up with the additional language with respect to the Subarea Committee's recommendation, and we agree with that.

And then, the Fish and Game added their Exhibit C. The two problems I have with Exhibit C, your Honor, is that they require a relook at the entire proposal if we are one acre foot over 2003/2004 water year, which seems preposterous to me.

I think that the Court has jurisdiction to look

1 at it at any time anyway if there's a change in the free  
2 production allowance used in a Subarea Committee or  
3 Subarea area.

4 But here, what the Fish and Game is asking for  
5 is that if we exceed 2003/2004 water year by one acre  
6 foot, then we start the process all over again.

7 THE COURT: I didn't see one acre foot.

8 MR. CRUISER: Well --

9 THE COURT: I understand what your concern may  
10 be. Fish and Game can help us out. "If the annual  
11 production as recorded by the Watermaster exceeds that of  
12 2003/2004 water year."

13 All right. Are you concerned about an acre  
14 foot, or can you adopt your language to come to some  
15 reasonable --

16 MR. VON HAAM: Well, your Honor, I think the  
17 intent is that if the water production in the basin is  
18 increasing, the Court would reconsider the rampdown  
19 question.

20 You know, whether it's one acre foot, you know,  
21 I don't think that's really the issue. The issue is a  
22 matter of relative pumping. If the pumping is increasing  
23 in the basin, then we want the Court to continue to look  
24 at it.

25 I mean, the concern is that, you know -- the  
26 primary concern is that by doing the 10 year moratorium,  
27 the Court is basically divesting itself of its discretion  
28 to continue looking at these issues. And we want to make

1 sure that, you know -- and we think it's a -- we think  
2 that it's a pretty big concession with all the bells and  
3 whistles, as Mr. Brunick refers to, in the first place.

4 And so, part one of the protection is to make  
5 sure that the Court has the ability to continue looking  
6 at this issue if THIS free water production is  
7 increasing.

8 THE COURT: Well, his concern is he doesn't  
9 want to come back if it's an acre foot.

10 MR. VON HAAM: Well, I mean, I guess the  
11 response would be, then, that you could have the same  
12 concern if it was 10 percent over, or you could say,  
13 "Well, if you went one acre foot over that line, we'd  
14 have to come back."

15 I mean, you know, the issue is what's the  
16 baseline? And the Baseline should be current water use.  
17 I mean, the whole idea of the judgment is to start  
18 getting the judgment to work in the basin.

19 MR. CRUISER: Your Honor, the problem -- I have  
20 the same concern the Fish and Game has; that if  
21 production shot up, that it should be revisited.

22 The problem I have is with the exact language  
23 that they used. They used language like "will." They  
24 will be revisited. And then once it's revisited, the  
25 second paragraph requires that the Watermaster bring the  
26 entire basin into balance in one year.

27 So it's almost taking the jurisdiction away  
28 from the Court to do this and requiring certain things

1 that have to happen in the end. And again, the way the  
2 language reads, one acre foot puts the whole thing into  
3 production.

4 Now, if it said, for example, "If it was 125  
5 percent of the basin" --

6 THE COURT: Okay. But the last sentence says,  
7 "These findings would be presented to the Court as a  
8 recommendation for a rampdown in the next water year."  
9 So, you're leaving the discretion with me as to whether  
10 or not an acre foot makes a difference.

11 MR. CRUISER: Well, does the Court want to go  
12 through this process, though, if we have only a one acre  
13 foot change? I mean, what kicks off the process? The  
14 way the language reads right now, one acre foot kicks off  
15 the process. Who's going to make that decision to kick  
16 off the process or not before it even gets to you, your  
17 Honor?

18 MR. VON HAAM: The Watermaster would, based on  
19 production. But again, let's use that hypothetical. If  
20 it was one acre foot over, and the Watermaster reported  
21 that, I really doubt that there would be a big human cry  
22 about one acre foot over.

23 MR. CRUISER: I have a suggestion, your Honor.  
24 If you take the 10 year moratorium where it says "will be  
25 revisited," and exchange it to "may," then it gives the  
26 Watermaster the option to take a look at what's  
27 happening, and it could decide whether or not to come  
28 back to Court.

1 MR. BRUNICK: We looked to the Court as the  
2 Watermaster anyway, with the ultimate authority to order  
3 whatever is appropriate. We will continue annually to  
4 report could the Court production levels in the Baja  
5 Subarea area.

6 And if the Court feels that production has  
7 substantially increased, the Court can order the  
8 Watermaster to further report to the Court or come back  
9 to the Court with additional recommendations. But I  
10 think that the people in the Baja Subarea wanted some  
11 stability, but this is not going to stop our reporting to  
12 the Court as to what the conditions are in Baja.

13 THE COURT: How about if you add a word in  
14 here. "If such events are demonstrated by the  
15 Watermaster to have occurred, the Watermaster shall  
16 recommend recalculation of the basin Free Production  
17 Allowance and the necessary rampdown to the Court," so  
18 you don't -- well --

19 MR. CRUISER: I think if we change two words.  
20 You change in the first -- second paragraph, you change  
21 "will" to "may," and in the second paragraph, you change  
22 "shall" to "may," then it provides them with the  
23 discretion to do it if they feel it's warranted.

24 So it would read "The 10 year moratorium may be  
25 revisited," and then in the second paragraph, it would  
26 say "The Watermaster may recalculate the basin." So you  
27 leave the discretion where it belongs, with the  
28 Watermaster.

1 MR. VON HAAM: And, your Honor, I think we  
2 disagree with that at that time dislikes bore brought  
3 Watermaster belonging to the Court, and we would prefer  
4 that that discretionary determination be made? By the  
5 Court, not with the Watermaster in the position of having  
6 to make a subjective decisions like that.

7 I mean, the Court's initial suggestion that the  
8 Court just made about adding "recommend," "the  
9 Watermaster to recommend," is more consistent with the  
10 way that the judgment is set out now, which is that the  
11 Watermaster is required to make recommendations upon  
12 certain conditions. So I think we'd be okay with that.

13 MR. CRUISER: I'm just trying to figure out  
14 who's going to determine what that trigger point is to  
15 start the process, your Honor. And it seems logical to  
16 me that the process -- the trigger should be with the  
17 Watermaster, the decision should be with the judge,  
18 and --

19 MR. VON HAAM: And, your Honor, the statements  
20 about the process is nothing. I don't know what the  
21 gentleman means by "the process." But the process -- the  
22 process would be making a recommendation to the Court. I  
23 mean, that's what it is. It's not as if the water use  
24 went up that there would be some kind of -- anything  
25 beyond what we've been doing. And frankly, we haven't  
26 really done anything yet. There hasn't been any rampdown  
27 beyond the first 20 percent.

28 MR. CRUISER: If Fish and Game wants to leave

1 it to the Court and the Watermaster, I'm not sure why  
2 they object to my language changes. It leaves it with  
3 the Watermaster and the Court.

4 MR. BRUNICK: I think the entire objective of  
5 have the Subarea area Advisory Committee was stability in  
6 not having to face annual recommendations or rampdown.  
7 And I think the 10 year moratorium addressed that. But  
8 we will continue to report to the Court if  
9 production -- all of a sudden there is a lot of  
10 development in the Baja Subarea.

11 So our report, whether we recommend rampdown or  
12 as the State would have us do, trigger rampdown, we are  
13 going to continue to recommend to the Court what the  
14 conditions are out there during this 10 year period.

15 If this Court feels things are out of wack, the  
16 State can come up, the lay people can come in, or the  
17 farmers can come in and say there has to be some action  
18 taken out there. So I think we looked -- the Mojave  
19 Water Agency looks to the Court as the ultimate  
20 authority.

21 MR. CRUISER: Well, you can do that without the  
22 language at all then.

23 MR. BRUNICK: Absolutely.

24 MR. CRUISER: Take all the language out.

25 MR. BRUNICK: We can put the language in or  
26 out, but -- and I think the whole goal of these folks was  
27 to get some 10 years stability in it. But if we come  
28 back and see production has increased 50 percent, we're

1 going to report that to the Court.

2 MR. CRUISER: I would expect you to.

3 MR. BRUNICK: What the Court decides or orders  
4 us to do is within the Court's discretion.

5 MR. CRUISER: And that's with or without the  
6 language.

7 MR. BRUNICK: Correct.

8 MR. CRUISER: So you don't need the language.

9 MR. VON HAAM: And, your Honor, the language is  
10 there for a reason. The language is there to acknowledge  
11 the potential for increasing pumping in that area.

12 And in light of the fact that there's such an  
13 excess of amount of Free Production Allowance already in  
14 Baja, and the fact that rampdown, as we said in our -- I  
15 don't know if the Court received our -- or we  
16 received -- we filed some papers somewhat late in  
17 response to this.

18 But, you know, pointing out what the  
19 Watermaster engineer found, which is that you can  
20 continue ramping down for several years, and there would  
21 be zero effect on water protection, zero effect or costs,  
22 so this is not -- you know, having this language, as the  
23 Fish and Game suggested, is not really costing anybody  
24 anything.

25 But the purpose of it is to recognize it and  
26 make sure that it's in the record and in the judgment  
27 that there are concerns that are continuing in Baja, and  
28 that the Court, you know, will continue to consider those

1 issues as we go forward.

2 Because locking in -- locking in rampdown at 75  
3 percent for 10 years is a pretty big step, and it's  
4 something that will ameliorate some of the risk of that.

5 MR. CRUISER: What's specific objection do you  
6 have to my language change?

7 MR. VON HAAM: Do you want me to respond? I  
8 don't want to -- if the Court would, can you just ask me  
9 a question?

10 THE COURT: Go ahead.

11 MR. VON HAAM: The objection we would have  
12 would be that it's clearer to give the Watermaster  
13 direction on what to do.

14 The judgment right now says, "If Free  
15 Production Allowance is a certain level above, the  
16 Watermaster shall recommend a rampdown to the Court,"  
17 and the Court decides.

18 And by -- and to make that consistent with the  
19 rest of the judgment, just leave it the way that it is in  
20 the other provisions of the judgment, which is, "If  
21 condition X exists, then Watermaster shall recommend Y."

22 If you -- because the Watermaster's role is  
23 more as a quantifying thing, and it's not a -- doesn't  
24 involve a lot of discretion. The discretion is with the  
25 Court, not with the Watermaster. And so this keeps the  
26 discretion with the Court, not the Watermaster.

27 MR. CRUISER: So we'll be back here next year.

28 MR. VON HAAM: I guess, if we were going to

1 respond to the question, what about the Court's  
2 suggestion saying "recommend," "the Watermaster shall  
3 recommend"? I cannot live with that.

4 MR. CRUISER: My objection still is that the  
5 process starts all over with a small amount of change.  
6 That's my problem. I want the Watermaster to have the  
7 ability to look at what the change is and say, yes, we  
8 need a change, we need to make a recommendation to the  
9 Court, not that you must make a recommendation.

10 The Watermaster would --

11 MR. VON HAAM: But we also want to be able  
12 to -- you know, if the water pumping is increasing, and  
13 then, for whatever reason, let's say the Watermaster  
14 board changes for Bottle Lake is the reason, they are not  
15 going to make a finding that there's been this increase,  
16 and then we've got no way to get to bring it back in  
17 front of the Court.

18 It basically reopens our ability to come to the  
19 Court to present our position on continuing water use in  
20 the basin. That's why, you know, that's why it needs to  
21 stay with the Court, not with the Watermaster.

22 MR. CRUISER: How about this, your Honor, going  
23 on what he just said, change that paragraph two, where it  
24 says if it changes between the 2003 to 2004 water year,  
25 that the production is increasing, that's a subjective  
26 amount that the Watermaster can look at and say, look,  
27 one foot is not increasing; it's not worth going through  
28 it for one foot.

1 THE COURT: It says, "If the annual production  
2 as recorded by the Watermaster exceeds that."

3 MR. CRUISER: I'm saying change it from  
4 "exceeds that" to "is increasing over the 2003-2004,"  
5 then the increase is a little more subjective.

6 THE COURT: But exceeds, isn't that increasing?

7 MR. CRUISER: It is, but exceeds means one  
8 foot. Increasing could be subjective. I still like -- I  
9 still thing the original language I proposed -- I'm not  
10 sure exactly why it changes anything.

11 I mean, Watermaster -- again, I agree with  
12 Mr. Brunick that even without this language, the  
13 Watermaster has a right to come back to Court if it's  
14 increasing, so technically --

15 THE COURT: And technically, what  
16 actually -- if the report comes out at the end of the  
17 water year and there's an increase, the Court can ask the  
18 Watermaster to recalculate it or come up with some  
19 evidence as to what's going on.

20 So --

21 MR. CRUISER: Well, your Honor, if you and I  
22 are not here next year, and the next person reads this,  
23 it's absolute. There's no room for movement. It's  
24 "shall" and "will," and that's the problem I'm having.

25 MR. VON HAAM: Your Honor, I've got another  
26 suggestion that maybe would bridge the gap here.

27 THE COURT: All right.

28 MR. VON HAAM: What if we -- where it says

1 "recorded" -- in the last sentence of the second  
2 paragraph -- instead of saying "exceeds 2003-2004 water  
3 year," it says "materially exceeds." That way, you get  
4 away from the one acre foot problem.

5 MR. CRUISER: I can buy that.

6 THE COURT: All right.

7 MR. CRUISER: If it's "materially," okay. I  
8 can buy that.

9 THE COURT: "Recorded by the Watermaster  
10 materially exceeds." Okay.

11 MR. CRUISER: That's good.

12 MR. BRUNICK: Accept.

13 THE COURT: We'll accept that language.

14 MR. BRUNICK: Thank you for your patience.

15 THE COURT: Thank you.

16 MR. BRUNICK: I'll submit the order to sign.

17 THE COURT: I'm sorry?

18 MR. BRUNICK: Shall I submit the order?

19 THE COURT: Yes. Submit the order to be  
20 signed.

21 MR. BRUNICK: Thank you, your Honor.

22 MR. CRUISER: Thank you, Ladies and gentlemen.

23 (Proceedings ended.)  
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