

SUPERIOR COURT OF CALIFORNIA

COUNTY OF RIVERSIDE

CITY OF BARSTOW, et al., )  
 )  
 Plaintiffs, )  
 )  
 vs. ) No. CIV208568  
 )  
 CITY OF ADELANTO, et al., )  
 )  
 Defendants. )  
 )  
 \_\_\_\_\_ )  
 )  
 AND RELATED CROSS-ACTIONS. )  
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REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE GLORIA CONNOR TRASK, JUDGE

MAY 29, 2015

APPEARANCES:

For Defendant/  
Cross-Complainant:  
Mojave Water Agency

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PROCEEDINGS OF FRIDAY, MAY 29, 2015

BEFORE THE HONORABLE GLORIA CONNOR TRASK.

THE COURT: City of Barstow we'll take in just a moment.

(A recess is taken.)

THE COURT: All right. We can bring everybody in on City of Barstow.

(There is a pause in the proceedings.)

THE COURT: Good morning.

In the matter of the City of Barstow versus City of Adelanto.

THE COURT: Mr. Brunick?

MR. BRUNICK: Good morning, Your Honor.

This seems like the --

THE COURT: Do you want to state your appearance?

MR. BRUNICK: Yeah. Bill Brunick representing Mojave Water Agency.

THE COURT: You need to speak up, please. One more time.

MR. BRUNICK: Bill Brunick representing Mojave Water Agency/Watermaster.

MR. HOFFMAN. Good morning, Your Honor.

Derek Hoffman of Gresham Savage on behalf of Mitsubishi Cement Corporation and Silver Lakes Association.

MR. MCGLOTHLIN: Good morning, Your Honor.

Russell McGlothlin on behalf of Calico Lakes Homeowners Association, O.F.D.L., Inc., and Wet Set. And appearing specially for Cheyenne Lake, Inc., Crystal Lake

1 Property Owners Association, John Horton, Horton Children's  
2 Fund, Lake Jodie Property Owners Association, Lake Wainani  
3 Owners Association, and WLSR, Inc.

4 THE COURT: How do you appear specially?

5 MR. McGLOTHLIN: I have been requested by the  
6 principals to appear on their behalf. They have -- They are  
7 parties to the case but have not been represented in my  
8 knowledge in years.

9 If Your -- If Your Honor -- If that is objectionable,  
10 I would just appear specifically on behalf of Calico, O.F.D.L.  
11 and Wet Set.

12 THE COURT: Well, I'm not aware of any special  
13 appearance for -- It sounds like these are all associations?

14 MR. McGLOTHLIN: They are. Your Honor, they are all  
15 members of a recreational lakes association known as the  
16 Newberry Springs Recreational Lakes Association.

17 THE COURT: Very good. I won't allow a special  
18 appearance. There is a thing known as a limited appearance.  
19 But you need to file a document in that regard.

20 MR. McGLOTHLIN: Sure.

21 THE COURT: So only as to those people that you have  
22 been specifically retained to represent may you appear on their  
23 behalf.

24 We still have some more folks.

25 MR. DALLARDA: Good morning, Your Honor.

26 Piero Dallarda, Best, Best & Krieger, on behalf of the  
27 Van Dam Family Trust, V-a-n D-a-m, Family Trust; the DeJong  
28 Family Trust, D-e-J-o-n-g; and Joe and Sue Harter; as well as

1 the Coalition for a Safe and Equitable Yield.

2 MS. LEVIN: Marilyn Levin, Deputy Attorney General for  
3 the Department of Justice representing the Department of Fish  
4 and Wildlife, previously the Department of Fish and Game.

5 THE COURT: How long are you going to have to keep  
6 saying "formerly Department of Fish and Game"?

7 MS. LEVIN: I took that out of my pleadings this year.  
8 I just wanted to throw it out there.

9 THE COURT: All right. Thank you.

10 I have published a tentative. And so that's what the  
11 court is interested in, is hearing from you based upon my  
12 tentative having to do with the Baja Subarea and whether or not  
13 the Rampdown should be 2.5 percent or 5 percent. And of course  
14 if anyone wants to discuss anything else, I'm happy to hear  
15 your comments.

16 Mr. Brunick, we'll start with you.

17 And if you all want to be seated, you are welcome to.  
18 It's up --

19 MS. LEVIN: Your Honor, --

20 THE COURT: -- to you.

21 Yes.

22 MS. LEVIN: -- may I ask? I -- I did not look for a  
23 tentative, and so I have not read the tentative. I don't know  
24 if anyone else has seen the tentative. But I have not. Is  
25 there a -- I'm sorry to admit that. But is there a copy of it?

26 THE COURT: We can accommodate you all.

27 No one --

28 MR. MCGLOTHLIN: No.

1 THE COURT: -- saw the tentative. Well, you don't  
2 practice law and motion. So, okay.

3 We'll take a brief recess. And I'll copy the  
4 tentative for you. And we'll distribute it. And we'll take a  
5 few moments for each of you to read it.

6 MS. LEVIN: Thank you, Your Honor.

7 (A recess is taken.)

8 THE COURT: Good morning again.

9 You all may be seated.

10 We're back on the record. Attorneys are present.

11 You all have had -- you can be seated or stand if you  
12 like, however.

13 You all have received a copy of the court's tentative.  
14 And who would like to be heard?

15 MR. BRUNICK: Your Honor, Mojave Water Agency  
16 recommends the 5 percent Rampdown in Baja. The Board suggested  
17 that we strongly ask the court to consider the differential  
18 Rampdown. We accept the language in the tentative that you  
19 don't feel the judgment allows a differential Rampdown.

20 So it's been since 1993 the judgment was entered. And  
21 we are still -- we have de-watered the basin by a million  
22 acre-feet. And that is in Exhibit 11 attached to Mr. Wagner's  
23 declaration. We need to address the issue quickly. And the  
24 5 percent Rampdown complies with the terms of the judgment.  
25 And since the differential Rampdown is precluded, I think the  
26 Watermaster strongly recommends the 5 percent Rampdown.

27 THE COURT: Well, you do agree that the differential  
28 is precluded by the judgment.

1 MR. BRUNICK: It -- It -- I think the court has the  
2 ability to consider a variety of different Rampdowns, as  
3 Judge Kaiser did. But for purposes of your ruling, your  
4 tentative, we accept that. Accept the tentative.

5 THE COURT: Well, I thought about that. And I  
6 thought, well, if Judge Kaiser were here, would he consider a  
7 differential? Because that's a totally new issue. And then I  
8 thought that doing that might open this entire thing up for  
9 appeals all the way up to the Supreme Court. And do we really  
10 want to do that where we have something that works pretty well?

11 MR. BRUNICK: I agree, Your Honor.

12 THE COURT: What about your thoughts as to the  
13 difference between 5 percent and 2.5 percent where it complies  
14 with the new State measures and it would bring it into  
15 compliance within a few years later, this new State Sustainable  
16 Groundwater Management Act of 2014, Water Code Section 10720,  
17 et seq., the goal which would be to achieve sustainability in  
18 all high and medium priority groundwater basins within the next  
19 twenty years. So 2.5 percent Rampdown would achieve this goal  
20 by 2027 according to the Watermaster's report. So that might  
21 be justifiable, and it would certainly give the agricultural  
22 producers an opportunity to continue what they're doing and to  
23 try and find other ways to produce.

24 Go ahead.

25 MR. BRUNICK: I think we've -- we've taken -- we've  
26 tried to -- a variety of different Rampdown percentages.  
27 Number one, the Groundwater Sustainability Act does not apply  
28 to Mojave Water Agency since it's an adjudicated basin.

1 THE COURT: It's a what?

2 MR. BRUNICK: It's an adjudicated basin, and it's  
3 specifically excluded from the Act.

4 We've -- We've tried --

5 THE COURT: But it -- But it -- it's in compliance  
6 with, or it's -- you can look at that and say that this would  
7 comply with that Act. Would we be in the -- you know, under  
8 their jurisdiction?

9 MR. BRUNICK: It meets -- I guess it would meet the  
10 spirit of the Act. But certainly we're excluded. And we have  
11 a million acre-feet of overdraft now. We have a variety of  
12 folks, small well owners, that -- whose wells are failing. And  
13 the more we prolong the Rampdown, the more critical the issue  
14 is going to become. So we have -- you know, we -- the  
15 Watermaster felt the 5 percent complies with the terms of the  
16 judgment and gets us to safe yield by 2018.

17 There still is some -- some issues by -- about  
18 carryover and using some of the water -- the extra water to  
19 serve the farming needs. But I -- I think the Watermaster --  
20 the Board had a hard time. We had a number of people appear.  
21 And they said, let's stick with the judgment, and we'll  
22 consider some sort of differential. And I think right now  
23 where we're at based on the tentative is we will consider to  
24 hang on the 5 percent.

25 MR. HOFFMAN. On behalf of Mitsubishi --

26 THE COURT: Your name again, please?

27 MR. HOFFMAN. Sure. Derek Hoffman --

28 THE COURT: All right. Yes. Go ahead.

1 MR. HOFFMAN. -- for Mitsubishi Cement Corporation and  
2 Silver Lakes Association.

3 And we support that as well, Your Honor, the 5 percent  
4 Rampdown. And I do agree with Mr. Brunick that Mojave is  
5 exempt from SGMA, the Sustainable Groundwater Management Act.

6 THE COURT: Thank you.

7 MR. McGLOTHLIN: Your Honor. Thank you.

8 Russell McGlothlin on behalf of the lakes  
9 associations.

10 We don't have the benefit of having the Watermaster  
11 Board to weigh-in on the choice here. They recommended, urged  
12 strongly differential Rampdown because they understood the  
13 equities at play; that your courtroom, Your Honor, this morning  
14 is filled with individuals that live in this community, 300  
15 families that --

16 THE COURT: Could you start again because I didn't --

17 MR. McGLOTHLIN: Sure.

18 THE COURT: -- understand what you just said.

19 MR. McGLOTHLIN: My point, Your Honor, is that the --  
20 the Watermaster appreciated the equities -- difficult equities  
21 at issue, families that live in this community that are on  
22 fixed income, many have retired, military families, that are  
23 having a hard time being able to keep their way of life, which  
24 is these recreational lakes and homes and expenses. And that  
25 is why -- Combined with the significant economic and  
26 environmental attributes and benefits they bring to the region,  
27 that is why the Watermaster Board urged this court to take a  
28 differential Rampdown recognizing the equities at play.

1           Given Your Honor's decision that a differential  
2 Rampdown is not prohibited by -- is prohibited by the judgment,  
3 we believe that a 2-and-a-half percent Rampdown will get us  
4 there to balance four years later and gives time for not only  
5 the families that I represent, the 300 families that make their  
6 life in the desert, but also the agricultural users that can  
7 adjust over time to meet this.

8           And you are correct, Your Honor, that it is certainly  
9 within the spirit of this Sustainable Groundwater Management  
10 Act which provides for up to, you know, twenty years to achieve  
11 sustainability once a plan is adopted, which does not need to  
12 be adopted even in the most critically overdrafted basins until  
13 2020. So we're speaking of a quarter of a century throughout  
14 the rest of the state that the legislature has recognized is  
15 sufficient time to bring these basins into balance. 2 and a  
16 half percent versus 5 percent will be simply asking for four  
17 additional years, which would help the families that live in  
18 this region.

19           THE COURT: Thank you.

20           MR. DALLARDA: Good morning, Your Honor.

21           Piero Dallarda of Best, Best & Krieger on behalf of  
22 the agricultural producers. Obviously we agree with the  
23 tentative. To the extent that there is really no  
24 differential -- there can't be differential treatment within  
25 the subarea.

26           In terms of the 2.5 percent -- in terms of the 2.5  
27 percent and the 5 percent reduction, we have asked the court  
28 for a 2.5 percent reduction. And we have good cause for that.

1           Number one, we agree that the Groundwater Management  
2 Act does not apply to this basin because it's an adjudicated  
3 basin; it's explicitly excluded. But as Your Honor pointed  
4 out, there is a spirit of it, which is we would be compliant  
5 within the third year than the Act contemplates. The only rush  
6 to apply a 5 percent reduction is that for the Watermaster he  
7 just achieves the balance four years earlier. But there's a  
8 cost to us in that. 75 percent of the Rampdown at 5 percent  
9 would affect agricultural producers. So we are about 75 -- we  
10 constitute about 75 percent --

11           THE COURT: Stop for a minute, please.

12           I don't understand what you mean.

13           MR. DALLARDA: Sure.

14           THE COURT: 75 percent of --

15           MR. DALLARDA: If you look at the people that would be  
16 affected by that differential Rampdown, and if you apply the  
17 5 percent, 73 percent of the agricultural --

18           The basic producers in the area are agricultural  
19 producers when it comes to quantity. So they would be severely  
20 affected by this. They cannot plant looking at one year ahead.  
21 They have to plant their crops. They have to decide whether or  
22 not they have to have fallow land. They have to decide whether  
23 or not they should basically get out of the business. For them  
24 to obtain any kind of financing, as the declarations provide,  
25 in order to adjust this Rampdown, it takes time and it takes  
26 also the idea that it has to be certain availability of water  
27 for them. If we impose a 5 percent Rampdown, they'll be out of  
28 business.

1           You've seen the declarations. It makes not a great  
2 difference to the rest of the basin. It makes not a great  
3 difference to the Watermaster, those four years. For my  
4 clients it makes a huge difference. It means staying in  
5 business or getting out of business. They want to stay in  
6 business, and they want to because, as I said, they've been  
7 doing for years. We have to adjust. We have to change the  
8 irrigation methods. We have to change perhaps crops. And they  
9 have done that. In fact, the Watermaster agrees. Change their  
10 crops, switch crops, for instance, from alfalfa to pistachios,  
11 and they can do that with time and obtain the necessary  
12 financing. And with a 5 percent Rampdown they just can't get  
13 there. The ones that will try to stay in business just won't  
14 get there.

15           And, again, the basin -- if the Watermaster's data is  
16 correct, we will be achieving -- we will be achieving the  
17 balance that the Watermaster wants by 2027, you know. And so  
18 we will be absolutely in compliance the with spirit and with  
19 very little harm to the community as a whole.

20           THE COURT: Thank you.

21           Miss Levin.

22           MS. LEVIN: Thank you, Your Honor.

23           The California Department of Fish and Wildlife  
24 supports the Mojave Water Agency's motion and strongly  
25 recommends that the court set the Free Production Allowance in  
26 the Baja Subarea at 50 percent for Water Year 2015-2016 and  
27 continue reduction in 5 percent increments as required by the  
28 judgment. Therefore, we support a recommendation of a

1 5 percent Rampdown this year and continuing.

2           Although the department previously agreed to the entry  
3 of a court order in 2010, as you know, Your Honor, which only  
4 required a 2.5 percent per year reduction through 2014-2015,  
5 the overwhelming evidence that was presented this year in  
6 declarations of Kit Custis, the expert for the Department of  
7 Fish and Wildlife, Alisa Ellsworth, the biological consultant  
8 for the Department, and Mr. Wagner, the Watermaster engineer as  
9 well, the overwhelming evidence indicates that during this  
10 five-year period using the 2.5 percent that we all agree to and  
11 had a compromise about, the following negative impacts have  
12 occurred in Baja. Groundwater levels in the Baja Subarea  
13 continue to decline by about 2 feet a year, or 40 feet over the  
14 last twenty years. The declining water levels in the Baja  
15 Subarea have had a continuing significant negative impact on  
16 the biological resources in and around Camp Cady Wildlife Area  
17 and the Baja Subarea.

18           There have been numerous reports of loss of well  
19 performance, and wells going dry have increased. The  
20 groundwater in storage continues to be depleted, meaning that  
21 because of the increased pumping there is less water in the  
22 basins. And unless we reduce the pumping and because of the  
23 overpumping start to use carryover rights and unused Free  
24 Production Allowance, there's not going to be any supplemental  
25 water brought into the basin. And, therefore, the water is  
26 going to continue to go down, and there won't be available  
27 water. There will be more wells going dry, and there will be  
28 more loss of well performance.

1           Just briefly. The history of the judgment, as you  
2 know, and Mr. Brunick mentioned it, shows that at least since  
3 you've been involved as well, since 2008, we have tried various  
4 approaches to various alternatives, compromises, and have been  
5 overly solicitous. And we understand all the arguments that  
6 are made by the lakes and the farmers and everyone. And we  
7 understand what's going on in Baja. But sadly the compromises  
8 have not helped the basin and have not increased the water  
9 levels, and the significant negative impacts have continued.  
10 In fact, as I recall, in 2010 -- since 2010, when we entered  
11 into the 2.5 compromise, water production has gone up. And  
12 it's never been -- it's never reached the levels of 2010 again.  
13 And if you look at the Annual Report and Mr. Wagner's report,  
14 with this compromise there was -- it wasn't that people had  
15 more time to -- to adjust. The pumping increased because they  
16 had more time to -- to adjust. And so the pumping did go up.

17           I'm not going to go through the summary of the history  
18 of the Rampdown motions. That's all in my pleadings from 2008  
19 on. I would request that the court take judicial notice of the  
20 judgment and the motions, declarations, and orders that have  
21 been previously filed in this case, including the Annual  
22 Reports that have been filed, you know, for the last years.

23           One last thing. And this is of a very important  
24 point. Had we all recommended, including the Department, that  
25 the requirements of the judgment be initially and continuously  
26 followed, the Free Production Allowance in the Baja Subarea  
27 would have been at 30 percent of Base Annual Production in  
28 2014. Instead, as we all know, the Free Production Allowance

1 in the Baja Subarea was 55 percent of Base Annual Production  
2 last year, in 2014.

3 So we have tried the alternatives. We have tried the  
4 compromises. And the basin is not sustainable. In Mr. Wag- --  
5 In Mr. Wagner's declaration he indicates that unless  
6 supplemental water is brought into Baja, the basin groundwater  
7 levels are going to continue to go down. And supplemental  
8 water will not be brought in until the Rampdown continues. And  
9 parties in Baja have to sell their carryover water in their  
10 unused Free Production Allowance, and only then will they have  
11 to pay assessments to bring in supplemental water. So this is  
12 not a new issue. This has been going on for many years.

13 I also just want to say that notwithstanding our  
14 recommendation for 5 percent Rampdown, which we understand is  
15 difficult for all of the entities, the Mojave Water Agency  
16 separately is considering other types of, as we said in our  
17 briefs, supplemental -- supplemental projects, let's say, to  
18 assist the Baja basin. And by having a 5 percent Rampdown this  
19 will encourage the -- the Mojave Water Agency, not as  
20 Watermaster, but just as the agency that has other abilities to  
21 enter into projects, get grants, there could be further relief  
22 for the Baja Subarea.

23 So I believe that it's important the Watermaster  
24 recommends 5 percent. All of the evidence submitted,  
25 Mr. Wagner's declaration, his PowerPoint presentations, his  
26 memorandum to the Watermaster Board, and then the declarations  
27 of Kit Custis and Alisa Ellsworth, all of the evidence before  
28 the court supports a 5 percent Rampdown.

1 THE COURT: Well, wouldn't --

2 MS. LEVIN: Thank you.

3 THE COURT: -- wouldn't -- wouldn't and couldn't those  
4 things take place even if the court did select the 2.5 percent?

5 MS. LEVIN: Yes, they could, Your Honor. They could.  
6 It's -- The 2.5 percent is going to take longer. And --

7 THE COURT: A few years longer.

8 MS. LEVIN: Pardon?

9 THE COURT: A few years longer.

10 MS. LEVIN: Well, it's not absolutely clear from the  
11 declaration exactly how long it's going to take. It assumes  
12 that production is going to stay the same. If you -- If you  
13 implement a 2.5 percent Rampdown, it could be that like in 2010  
14 the production goes up. So it doesn't necessarily mean that  
15 it's going to be the exact number of years that have been  
16 evaluated. And so hopefully it will and everyone will work in  
17 good faith to -- to get that done. But it's -- it's not  
18 assured. And it also depends on there's two different terms.  
19 One's in balance and safe yield. And it all depends on how  
20 much carryover is -- is there, whether there's a market for the  
21 carryover that people can afford to buy it. So -- So when --  
22 when the terms are in balance, it really relates to production,  
23 carryover, unused Free Production Allowance, the market in the  
24 basin, et cetera. So it's not an absolute -- I believe, just  
25 reviewing the declarations and the charts and our own expert,  
26 it's not an absolute assured -- assured date.

27 And -- And I just have to say this. As you may  
28 imagine, the Groundwater Sustainability Act, you know, was a

1 political compromise that I can -- I can see, I believe.  
2 And -- And the -- the reason folks are being given so much time  
3 is -- should not apply to the Baja Subarea and the Barstow  
4 Area. These folks had a lawsuit. There's a million acre-feet  
5 of -- of water that's been lost. And to their -- to their  
6 credit, they have been work- -- all the Baja people together  
7 have been working really, really hard so that we're -- we are  
8 hopefully ahead of the drought that's affecting all of us. And  
9 so it's nice to use an analogy. But I believe that this basin  
10 is ahead of the game and is working really hard to come up with  
11 ideas on how to make this safe and sustainable. And I think  
12 the 5 percent will do it.

13 THE COURT: That was very diplomatic and yet very to  
14 the point. You maneuvered that very well.

15 Mr. Brunick, comment?

16 MR. BRUNICK: Your Honor, the reason that we continue  
17 to recommend 5 percent is we've got 1300 -- 1300 folks, houses,  
18 and small producers that are not subject to the judgment. And  
19 their wells are the most jeopardized by allowing this item not  
20 to be addressed. That's why we have recommended 5 percent.

21 But what Fish and Wildlife indicate, Mojave Water  
22 Agency is working with other programs, and I'm sure some of the  
23 folks that have attended these meetings think it's pie in the  
24 sky. But we are trying to come up with the community with  
25 programs that will work.

26 THE COURT: Mr. McGlothlin?

27 MR. MCGLOTHLIN: Thank you, Your Honor.

28 I do want to echo that the lake associations will

1 certainly commit to working with Watermaster and Fish and  
2 Wildlife towards those solutions. And I -- And I do think that  
3 we have a good thing and a structured management plan which  
4 other areas of the basin -- or other areas of the state do not.

5           However, the equities remain. This court does have  
6 broad equitable powers in water cases to ensure the sustainable  
7 management is done in the most equitable manner. And you've --  
8 I think you understand, Watermaster certainly understands, the  
9 challenges that are being imposed upon the families that live  
10 here.

11           And I would just highlight that this is an annual  
12 event of us showing up before you, to your pleasure, I'm sure.  
13 And you will be able to evaluate annually whether or not 2 and  
14 a half percent or 5 percent is necessary depending upon the  
15 quantity of production that is occurring.

16           In 2010 the basin was close to in balance, where FPA,  
17 Free Production Allowance, and the Production Safe Yield were  
18 close to in balance. And yes, production increased,  
19 presumptively because of changes in the economics in the crop  
20 market. That may occur in the future. That may not. And I  
21 suggest that Your Honor adopt the 2 and a half percent because  
22 of the equities involved this year, evaluate where production  
23 goes. And in any respect, as you look at Exhibit 11 to  
24 Mr. Wagner's declaration, it grasps the -- the four scenarios  
25 in coming into balance. The proposed 5 percent would bring the  
26 basin into a balance at 2022-23.

27           THE COURT: Give me just --

28           MR. McGLOTHLIN: And 2 and a half --

1 THE COURT: Give me just --

2 MR. McGLOTHLIN: -- percent would bring the --

3 Yes, Your Honor.

4 THE COURT: Give me one minute to find --

5 MR. McGLOTHLIN: Absolutely, Your Honor.

6 THE COURT: All right. Continue. I have it.

7 MR. McGLOTHLIN: So, Your Honor, the 5 percent is the  
8 red line, and that showed the basin coming into balance in  
9 20- -- just around 2022-2023. The green line at  
10 2-and-a-half-percent Rampdown shows it coming in at around  
11 2025-2026. So we're talking about roughly three years of  
12 difference and significant equitable issues at play. And we  
13 can evaluate this again next year or the year after if it  
14 appears that production in fact is increasing.

15 I will say one thing that -- just anecdotally. My  
16 clients inform me that they are trying very diligently to  
17 purchase carryover water and are finding that it is not  
18 available in significant quantities. And so it is -- they are  
19 struggling and certainly not at prices that they have been able  
20 to afford in the past. So this is -- I'm not crying wolf here.  
21 I'm -- I have retired folks that have a fixed income. And some  
22 of the associations may frankly not exist if the economics  
23 change drastically against them. And we would like the time to  
24 try to work with the other parties here to come up with  
25 long-term or permanent solutions. And some of those may be  
26 programs to purchase out water, to use the lakes as  
27 replenishment basins as well, dual service for wildlife  
28 habitat, et cetera. So we'd like time to be able to explore

1 those options, Your Honor.

2 THE COURT: Mr. Dallarda?

3 MR. DALLARDA: Just a couple quick points, Your Honor.

4 The first one, when it said that production has  
5 increased by the agricultural producers in the area, I don't  
6 think that is true. If you look at the declaration of  
7 Mr. Wagner, Paragraph 27, and you look at the motion at  
8 Page 13, it is clear that the agricultural group is the group  
9 that has made the longest, the greatest progress in terms of  
10 both reducing the amount of water that is being used and as  
11 well as changing the way they do business in order to achieve  
12 that. But that takes time.

13 In 2010 there was an agreement to keep everything at  
14 2.5 percent. Now we're moving -- we're moving the target to  
15 5 percent. Whereas, as was pointed out by the lake owners  
16 association, the difference is three or four years. For my  
17 clients three or four years is a lot because it's the four  
18 years that allows them to make the switches that they need to  
19 make in order to reduce production or adjust their business to  
20 survive in this kind of environment.

21 THE COURT: But this is not a new problem that they  
22 have just discovered. I mean, this has been ongoing for years  
23 to plan for.

24 MR. DALLARDA: Absolutely.

25 THE COURT: That's what I don't understand.

26 MR. DALLARDA: You have to get the money from the  
27 banks in order to do what you need to do in terms of changing  
28 irrigation, changing your crops. You have to go to the banks

1 and give them some kind of certainty. The clients have gone to  
2 the banks. They have started the process of a 2.5 percent  
3 number that has been provided to those financing institutions.  
4 That's going to happen also now as we move forward. But those  
5 financing institutions have certain limits in terms of the risk  
6 that they're willing to take. Us, the numbers start getting  
7 smaller because the percentages go higher in terms of their  
8 reduction, then it makes it even harder for them to get the  
9 financing necessary to actually make the changes that need to  
10 occur for all this to work.

11 THE COURT: All right.

12 I can't help but think in the news is what's going on  
13 in Texas. And they had a drought, and all of a sudden now they  
14 don't have a drought. Maybe one day we'll have some rain. But  
15 I guess since this has been -- this judgment has been since  
16 1993, not too much hope of that.

17 Let's take brief recess. And we'll resume in, let's  
18 say, about 10:00 o'clock.

19 MR. McGLOTHLIN: Thank you, Your Honor.

20 MR. HOFFMAN. Thank you, Your Honor.

21 (A recess is taken.)

22 THE COURT: We are back on the record in the matter of  
23 City of Barstow versus City of Adelanto.

24 I guess I have just a couple of questions probably  
25 directed to Mr. Dallarda. And that has to do with the  
26 agricultural producers. Are they still accumulating  
27 carryovers? And if the court orders a 5 percent Rampdown,  
28 would that reduce the production of water?

1           MR. DALLARDA: In terms of the carryovers, I believe,  
2 Your Honor, that they don't. But I will have to consult my  
3 clients. I would not want to misrepresent this to the court.  
4 But --

5           THE COURT: Because --

6           MR. DALLARDA: -- the problem that we have --

7           THE COURT: -- that's -- that's an important issue --

8           MR. DALLARDA: Yes.

9           THE COURT: -- and maybe you all want to look at your  
10 notes or look at the record that we have. Because if they are  
11 simply accumulating carryovers and that's the complaint, then  
12 that's not fair to the smaller producers whose wells are being  
13 depleted.

14           MR. DALLARDA: I don't believe they are, Your Honor;  
15 but let me just....

16           THE COURT: Very good. Take a moment.

17           I think Mr. Brunick has a comment.

18           MR. BRUNICK: I think how it works is if there is --  
19 if they don't use their production in one year, it carries  
20 over. So what most of the agricultural interests are doing is  
21 pumping their carryover water first, and then carrying over the  
22 production. So it just rolls over from year to year. So  
23 essentially, let's say, in '15 they're pumping carryover.  
24 They're not pumping their Free Production Allowance. That  
25 kicks over. So it just keeps moving on down the road.

26           Eventually it will be burnt up. But when is unknown.  
27 And that applies not just to the farmers. It applies to the  
28 smaller producers. The lakes, it may apply to. But the

1 farmers primarily are the ones that are taking advantage of the  
2 carryover provisions.

3 THE COURT: So they might not necessarily be as  
4 impacted as they claim should the court order the 5 percent.

5 MR. DALLARDA: Ah --

6 THE COURT: Wait. Let me hear from Mr. Brunick.

7 MR. BRUNICK: That's correct. That would start  
8 eating -- And that's the purpose of -- of the schematic and why  
9 it may take as long as it's going to take, on Exhibit 11, to  
10 hit safe yield. If we went just 5 percent, we would be at safe  
11 yield in 2018, roughly. If we take 5 percent with the  
12 carryover and the unused Free Production Allowance, it's going  
13 to take longer.

14 THE COURT: I see.

15 MR. McGLOTHLIN: Your Honor?

16 THE COURT: Yes.

17 MR. McGLOTHLIN: Thank you. Russell McGlothlin.

18 The carryover is presently essential to the lakes  
19 associations because they don't have any carryover. But that  
20 is their lifeblood to purchase at present what carryover is  
21 available that they can have.

22 Traditionally they've been able to obtain that at --  
23 at reasonably financially acceptable rates. It's becoming  
24 tougher and tougher. And I think, you know, we accept that  
25 that is indicative of the fate that we're facing, that it will  
26 become more and more difficult as carryover dries up. But, you  
27 know, it is -- it's -- it is fully baked into the schematic  
28 that is in Exhibit 11 of the Wagner, you know, declaration

1 showing the scale of Rampdown.

2 THE COURT: Mr. Dallarda.

3 MR. DALLARDA: Yes, Your Honor.

4 I've consulted with my clients. The carryover, it is  
5 very small, and is the result of basically conservation mainly.  
6 All the conservations that the farmers have started to do have  
7 allowed them to save a little bit of that water that carries  
8 over. It was very small. And it doesn't necessarily really  
9 help in terms of the -- the four years or so.

10 As pointed out by the lake associations, if we look at  
11 the numbers and the years that were proposed by the  
12 Watermaster, they took carryover into consideration because  
13 that's part of the deal; that was part of the compromise. That  
14 if you go ahead and do conserve, and you do obtain a carryover  
15 or you gain a carryover, that you would be able to use that  
16 just as a small cushion. There's a very small cushion. It's  
17 nothing that is going to save them if we go from 2.5 percent to  
18 5 percent.

19 THE COURT: If the court were to impose the  
20 2.5 percent Rampdown as opposed to the 5 percent, would they be  
21 able to -- Well, let me start again. If I did that, I wouldn't  
22 want there to be a projection that that is what the future will  
23 hold for them. Would they be able to say, well, we relied on  
24 2 percent -- 2.5 percent, therefore we can't exist unless we  
25 have 2.5 percent --

26 MR. DALLARDA: I think the --

27 MS. LEVIN: -- hereafter?

28 MR. DALLARDA: I think the writing is on the wall for

1 the agriculture interest in the Baja area, Your Honor, that  
2 they have to do something very -- very quickly to try to adapt  
3 to what's happening. But that's -- they need that time. It's  
4 switching a farm operation that's been going on for many, many  
5 years is not that simple. If you switch from alfalfa to  
6 pistachios, you have to change irrigation systems. It takes a  
7 long time to get there. You have to plant the trees. You have  
8 to wait for the trees to grow -- you have to wait for the trees  
9 to mature to produce the fruit so you can sell it. That takes  
10 time. It's not --

11 THE COURT: I know. But this isn't breaking news.  
12 This has been going on for years.

13 MR. DALLARDA: Some have been doing it. And that's  
14 the result -- As the Watermaster admits, you know, there's been  
15 a lot of conservation achieved by the farmers in the last four  
16 or five years. It's in the Watermaster's declaration. He's  
17 acknowledged that they are doing something. They haven't sat  
18 there and just waited for the sky to fall. They have actually  
19 started doing things. And that shows in the attempts of the  
20 water reductions that they have achieved and the small  
21 carryovers that they have which is a result of that  
22 conservation.

23 THE COURT: What does "small" mean? Can you --

24 MR. DALLARDA: It's -- It's --

25 THE COURT: -- quantify it --

26 MR. DALLARDA: -- It's different --

27 THE COURT: -- for me?

28 MR. DALLARDA: -- for each -- It's very different,

1 Your Honor, for each of the farmers. And, you know, and we  
2 can -- we can provide the court if necessary as a supplemental  
3 document what it is for each of them that I represent.

4 THE COURT: Perhaps Mr. Brunick has a handle on what  
5 "small" means in terms of carryover. Are you aware of that?

6 MR. BRUNICK: I -- I am not.

7 Essentially in the past it has been that they're  
8 carrying over enough water at least to cover their cropping  
9 patterns for the next year. Now, that may have declined with  
10 the -- since we're back into the Rampdown. But essentially  
11 they've been over -- they've been able to carry over enough  
12 water that more than covers their cropping for the next year.  
13 And that's one of the problems. We've got a lot of carryover  
14 that is out there. And that's in -- IN your Watermaster report  
15 that we've lodged with the court as to the carryover water that  
16 each individual producer has.

17 THE COURT: Can you point me to that?

18 MR. BRUNICK: I didn't --

19 THE COURT: You didn't bring it.

20 MR. BRUNICK: I didn't bring the -- the....

21 THE COURT: You can have my copy.

22 MS. LEVIN: Your Honor, Marilyn Levin.

23 THE COURT: Yes.

24 MS. LEVIN: I'm not sure if our expert moved the  
25 tables around himself. But he referred to a Table 4 in the  
26 Annual Report. And I don't know if he just added, you know,  
27 carryover. But carryover is -- is essentially different every  
28 year. And it's different for each individual producer. So the

1 court would have to look at, you know, not only necessarily the  
2 people who are appearing here, but every single producer.

3 And it's -- I believe it's broken down, but I may be  
4 wrong. Maybe our expert did this. But one to a hundred,  
5 et cetera. But he was referring to Table 4 of the Annual  
6 Report that he started out with. I don't know if that includes  
7 carryover or not.

8 THE COURT: All right.

9 I have been handed a copy of the 21st Annual Report,  
10 Water Year 2013 to 2014. And I'm looking at Appendix B,  
11 Producer Replacement Water and Makeup Water Obligations, Unused  
12 FPA.

13 Let's go off the record for a minute.

14 (There is a pause in the proceedings.)

15 THE COURT: All right. I'm going to return this.

16 Deputy, I'm going to return this.

17 Thank you.

18 All right. Anything further?

19 MR. McGLOTHLIN: Your Honor, --

20 THE COURT: Yes.

21 MR. McGLOTHLIN: -- just very briefly. The carryover  
22 is -- is unused FPA that is going to be shrinking over time. I  
23 think if we look at from a practical aspect when the basin --  
24 what we can expect, if we look at the table of coming into  
25 balance and it's projected at 2025-2026 at 2-and-a-half-percent  
26 Rampdown, if we accept that that is an acceptable -- if  
27 Your Honor accepts that that is an acceptable time to come into  
28 balance, I urge the court -- I urge Your Honor to adopt

1 2-and-a-half-percent Rampdown this year and then have this  
2 model yearly to ensure that we are adhering to that practical  
3 end. If not, at that point a 5 percent would be justified.  
4 But at this time take the -- the measured step and ensure that  
5 we're on that practical end towards that date rather than a  
6 specific quantity now untied to a practical end of a date of  
7 balancing Free Production Allowance to Production Safe Yield.

8 THE COURT: Anything further?

9 MS. LEVIN: Yes.

10 THE COURT: Miss Levin, go ahead.

11 MS. LEVIN: Two things. I will respond to what  
12 Mr. McGlothlin just said.

13 But, first, I just wanted to bring us back to 2008  
14 when the court entered an order lifting a ten-year moratorium  
15 that was entered into in 2005. And the statement was Baja  
16 shall return to the judgment and its provisions as the  
17 operative management strategy.

18 I understand that two years later we entered into  
19 another compromise. And maybe we shouldn't have; but, again,  
20 it was to achieve certainty and avoid litigation and give  
21 people time, five years, to realize that they may have to  
22 return to the operative management strategy of 5 percent per  
23 year, which in and of itself gives us certainty. Therefore, I  
24 believe that we should adopt the 5 percent.

25 In response to what Mr. McGlothlin said, I'm of two  
26 minds. What I don't want is I don't think the court has enough  
27 evidence before it to say that the 2.5 is ad infinitum until,  
28 you know, 2024 or 2025. On the other hand, as Your Honor

1 knows, we all want to avoid coming back here every year and  
2 arguing about what the percentage should be. So I don't know  
3 how to answer that.

4 If the court were going to order 2.5 percent, it  
5 really has to be re-evaluated in the sense every year by the  
6 Annual Report by the Watermaster. On the other hand, certainty  
7 would be nice. And I believe certainty is the operative  
8 management from the judgment. Certainty is 5 percent. That's  
9 what everyone signed up for all those years ago. Department of  
10 Fish and Wildlife wasn't wildly happy at the time with what we  
11 entered into. But we've lived by it. And, also, we've  
12 compromised many, many times over the years. And I believe  
13 that for everyone, knowing that the judgment is the judgment  
14 and it's 5 percent and that's going to be what is happening in  
15 the future, I think that's the best that everyone in the basin  
16 can have, which is that certainty that we all keep looking for  
17 in the future.

18 So I would -- Thank you.

19 MR. BRUNICK: One --

20 THE COURT: You're very persuasive.

21 Mr. Brunick.

22 MR. BRUNICK: One -- I think whatever order the court  
23 enters in Baja, 2 and a half or 5, I think the order should  
24 reflect that the 2 and a half stays in effect until Production  
25 Safe Yield is reached. Each year we have to come to the court.  
26 Each year Mr. McGlothlin or other attorneys can say that 2 and  
27 a half is -- is insufficient or Fish and Wildlife may say it  
28 should go to 5. But the degree of certainty it gives the

1 Watermaster at 2 and a half until Production Safe Yield is  
2 reached or 5 until Production Safe Yield is reached allows us  
3 to manage and develop other programs to deal with the  
4 community. So whatever -- I think certainty is important for  
5 the Watermaster in whatever word the court chooses to fashion.  
6 Whether it's 2 and a half or 5, it should run until Production  
7 Safe Yield is realized, keeping in mind that we have to do this  
8 every year anyway.

9 THE COURT: Are you saying now that you are persuaded  
10 that 2.5 is the better amount?

11 MR. BRUNICK: No. My -- I feel that 5 percent is --  
12 is the correct number. But the Watermaster will work with  
13 whatever the court orders.

14 THE COURT: Are you saying that if the court sets the  
15 Rampdown at 2.5, then it should remain at 2.5 as opposed to  
16 going back to 5?

17 MR. BRUNICK: 2.5 until Production Safe Yield is  
18 reached, yes. And --

19 THE COURT: But not be raised, say, next year to 5?

20 MR. BRUNICK: Not unless somebody comes to court and  
21 says it should go up.

22 THE COURT: I see. Okay.

23 MR. DALLARDA: And we agree with that, Your Honor.  
24 Certainty is I think something that everyone wants here. It's  
25 just that for us the 5 percent puts us in a really tough  
26 position. If we have certainty that 2.5 percent's the number  
27 as we thought we did in 2010, then, you know, we can plan ahead  
28 for all of this.

1 MR. McGLOTHLIN: Your Honor, we -- we the lakes  
2 associations concur as well. We can accept that the basin must  
3 be balanced. It's simply a matter of time and ability to plan.

4 THE COURT: Very good. Thank you.

5 The matter will stand under submission.

6 Thank you all very much.

7 MR. BRUNICK: Thank you, Your Honor.

8 MS. LEVIN: Thank you, Your Honor.

9 MR. McGLOTHLIN: Thank you, Your Honor.

10 MR. DALLARDA: Thank you, Your Honor.

11 THE COURT: I'll see you all next year.

12 (Proceedings are adjourned.)

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Re: City of Barstow vs. City of Adelanto  
Riverside Case No. CIV208568

Reporter's transcript of proceedings  
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Gloria Connor Trask, Judge, Department 1.  
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Thank you,

Patricia L. Hanson, CSR 2329