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Attorneys for Defendants
PHELAN PIÑON HILLS COMMUNITY
SERVICES DISTRICT

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE

CITY OF BARSTOW, et al.,
Plaintiffs,

v.

CITY OF ADELANTO, et al.,
Defendants.

Case No. CIV 208568

**DECLARATION OF WESLEY A.
MILIBAND IN OPPOSITION TO THE
PROPOSAL TO VACATE THE STAY OF
RAMPDOWN TO REDUCE THE
MUNICIPAL AND INDUSTRIAL FREE
PRODUCTION ALLOWANCE TO 60%
IN THE OESTE SUB-AREA FOR WATER
YEAR 2020-2021**

AND RELATED CROSS ACTIONS.

Hearing Date: July 9, 2020
Time: 1:30 p.m.
Judge: Hon. Craig G. Reimer
Dept.: 1

I, WESLEY A. MILIBAND, declare:

1. I am an attorney at law duly licensed to practice before all courts in the State of California. I am a partner with the law firm Atkinson, Andelson, Loya, Ruud & Romo, attorneys of record for Defendant Phelan Piñon Hills Community Services District ("Phelan Piñon Hills") in the above-captioned matter based on the Substitution of Attorney filed concurrently with this Declaration. Also filed concurrently with this Declaration is the Declaration of Don Bartz, General Manager of Phelan Piñon Hills. Phelan Piñon Hills has never appeared in this case but is a successor-in-interest, as set forth in more detail below, to an original party to this action – San

Bernardino County Service Area 70. I filed the Substitution of Attorney in the abundance of caution for candor to the Court and parties, and given that Phelan Piñon Hills appears on the service list, as it should, but without legal counsel identified. If called upon as a witness, I would testify competently to the following of my own personal knowledge, except as to those matters stated upon information and belief, which I believe to be true.

SUMMARY OF PHELAN PIÑON HILLS'S POSITION

2. Phelan Piñon Hills opposes the Free Production Allowance ("FPA") for Municipal and Industrial ("M&I") users in the Oeste Sub-Area because: (1) differential rampdown is inequitable and inconsistent with Paragraph 23(a) of the Judgment; and (2) the Mojave Water Agency as Watermaster ("Watermaster") should first undertake adequate hydrologic and hydrogeologic studies to justify a rampdown to 60%, or any other percentage that has not yet been demonstrated to be necessary to fulfill the terms of the Judgment. To be clear, Phelan Piñon Hills understands rampdown is part of the Judgment and needed for the health of the groundwater supply; it is the extent of and grounds for the rampdown that Phelan Piñon Hills opposes here. Also noteworthy is that Phelan Piñon Hills generally enjoys a positive working relationship with the Watermaster, which in large part is why Phelan Piñon Hills has not appeared before this Court until now. Ultimately, Phelan Piñon Hills requests the Court adhere to its approval of the Watermaster's proposal that the FPA be reduced from 75% to 70% of Base Annual Production ("BAP") for the Oeste Sub-Area for Water Year 2020-2021, as set forth in the Court's June 11, 2020 Order to Show Cause re Vacation of Stay of Rampdown for Municipal and Industrial Producers in the Oeste Sub-Area ("Order") at page 2.

BRIEF FACTUAL BACKGROUND OF PHELAN PIÑON HILLS

3. I am informed and believe that: (i) Phelan Piñon Hills is a public agency formed as a community services district during February 2008, having succeeded to the Special Districts Department of San Bernardino County for providing, among other services, water to serve to the Phelan and Piñon Hills communities; (ii) Phelan Piñon Hills's entire service area is within San Bernardino County located next to the San Bernardino / Los Angeles County line, which includes the Oeste Sub-Area that is part of the Court's June 12, 2020 Order; (iii) as of 2014, Phelan Piñon

Hills provides municipal water service to more than 21,576 residents throughout approximately 6,778 service connections; and (iv) Phelan Piñon Hills provides water for municipal use to which groundwater produced by Phelan Piñon Hills's wells is applied at approximately 97% for domestic purposes, with approximately 3% of produced water used for commercial purposes.

**REASONS FOR NOT IMPOSING THE 60% FPA ON M&I USERS SUCH AS
PHELAN PIÑON HILLS**

4. The first of two reasons for Phelan Piñon Hills opposing a rampdown to 60% is that the 60% FPA rampdown being contemplated is not the same for all Producers in the Oeste Sub-Area, but instead is a differential rampdown between M&I producers potentially set at 60% and agricultural users set at 70%. A differential rampdown is not appropriate for at least the following three reasons:

a. This Court, in its Order at page 2, correctly observed in pertinent part that: "...this Court is of the belief that differential rampdowns are not consistent with the judgment...";

b. The Watermaster through its legal counsel stated to this Court last year, similar to the first point above, that: "A differential rampdown is not equitable pursuant to Paragraph 23 (a) of the Judgment. A similar proposal (2015) was submitted to the Court and was rejected by Judge Trask because it did not comply with the Judgment, would fail to achieve sustainability more efficiently, was not equitable and did not provide relief to minimal producers in the area due to continued depletion of storage." (Supplemental Memorandum Of Points And Authorities On Watermaster's Motion To Adjust Free Production Allowance For Water Year 2019-2020 And Response To Oppositions Of City Of Hesperia And Newberry Springs Recreational Lakes Association, dated May 30, 2019 ("Watermaster's Supplemental Memorandum")), p. 10:16-19. A true and correct copy of the Watermaster's Supplemental Memorandum *without* the Memorandum's exhibits is attached hereto as **Exhibit A**. Paragraph 23(a) (Standard of Performance) of the Judgment states in its entirety: "Watermaster shall, in carrying out its duties, powers and responsibilities herein, act in an impartial manner without favor or prejudice to any Subarea, Producer, Party or Purpose of Use.

c. A differential rampdown is inconsistent with the Judgment also pursuant to
CIV 208568

1 Paragraph 10, which states in pertinent part that: "In consideration of the foregoing factors, and in
2 accordance with the terms and conditions of this Judgment, the Parties are estopped and barred
3 from asserting special priorities or preferences." (Judgment, Paragraph 10, p. 21:3-6.)

4 5. The second of two reasons for Phelan Piñon Hills opposing a rampdown to 60% is
5 that the Watermaster should first undertake adequate hydrologic and hydrogeologic studies to
6 justify a rampdown to 60%. However, I am informed and believe, and as stated by Mr. Bartz in
7 his Declaration, the Watermaster has not performed studies on the Oeste Sub-Area since around
8 the time that the Judgment was entered in 1996 to justify imposing a rampdown to 60% FPA.

9 **REQUESTED ACTION**

10 6. For all of the foregoing reasons and supporting information, and others as might
11 arise during the Order to Show Cause hearing on July 9, Phelan Piñon Hills respectfully requests
12 that the Court not impose the 60% FPA but instead adhere to the FPA being reduced from 75% to
13 70% of Base Annual Production ("BAP") for the Oeste Sub-Area for Water Year 2020-2021 as
14 previously recommended by the Watermaster and approved by the Court.

15
16 I declare under penalty of perjury under the laws of the State of California that the
17 foregoing is true and correct.

18 Executed on this 1st day of July, 2020 at Sacramento, California.

19
20 
21 _____
22 Wesley A. Miliband

EXHIBIT A

COPY

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COUNTY OF RIVERSIDE

MAY 31 2019

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MOJAVE WATER AGENCY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF RIVERSIDE

CITY OF BARSTOW, et al.,

Plaintiff,

vs.

CITY OF ADELANTO, et al.,

Defendant,

CASE NO. CIV 208568

**SUPPLEMENTAL MEMORANDUM
OF POINTS AND AUTHORITIES ON
WATERMASTER'S MOTION TO
ADJUST FREE PRODUCTION
ALLOWANCE FOR WATER YEAR
2019-2020 AND RESPONSE TO
OPPOSITIONS OF CITY OF
HESPERIA AND NEWBERRY
SPRINGS RECREATIONAL LAKES
ASSOCIATION**

Assigned for All Purposes to:
Judge Craig Riemer
Dept. 1

**DATE: June 6, 2019
TIME: 1:30 p.m.
DEPT: 1**

AND RELATED CROSS ACTIONS

Mojave Water Agency, in its capacity as Mojave Basin Area Watermaster ("Watermaster"),
submits the following in response to the City of Hesperia ("Hesperia") and the Newberry Springs

1 Recreational Lakes Association's ("NSRLA") oppositions to the Watermaster's recommendation to
2 adjust Free Production Allowance for Water year 2019-20. The Watermaster filed its motion to adjust
3 Free Production Allowance for Water Year 2019-2020 on May 1, 2109. Supplemental Points and
4 Authorities are included herein as it relates to Workshops held by Watermaster to allow input from the
5 public.

6 I.

7 BACKGROUND

8 In 1960 a halt on growth and development in the Victor Valley area was ordered by the
9 California Real Estate Commissioner due to rapid growth and lack of water availability. The State
10 Water Project and the formation of the Mojave Water Agency took place in 1958-1960. The first water
11 adjudication was attempted during the 10 year period of 1964-1974, it ultimately failed and was
12 dismissed by the Superior Court of the County of San Bernardino. A variety of environmental and
13 CEQA lawsuits were prevalent in the Mojave Basin area involving water supply and development
14 between 1975 and 1990. In 1990, the City of Barstow filed a complaint which resulted in the current
15 Judgment after a three-month trial by Judge Kaiser. The Judgment was appealed to the Court of
16 Appeals and the California Supreme Court. After a 12-year legal proceeding, Justice Ward of the
17 Fourth District in 2002, facilitated a settlement agreement which allowed full implementation of
18 Judgment.

19 Since Kit Carson and John C. Fremont explored the area in 1844, the Mojave River has been
20 recognized as providing a water supply to the region and aided the development of Huntington's
21 Crossing (City of Victorville) and Hesperia (Hesperia Land and Water Company).

22 Growing population, industry and agriculture competed for available water within the Mojave
23 River, which measures 333 square miles and a riverbed that is dry six to eight months during the year.
24 The Mojave River is a stream which received its principal water from 217 square miles of mountain
25 headwaters from the San Bernardino Mountains. (State Division of Water Resources Publication,
26 Bulletin 47)

27 The State of California initiated the State Water Project which would provide supplemental

1 water through a 400 mile conveyance system (California Aqueduct). Mojave Water Agency was
2 created by legislation in 1959 and was approved by the voters by a vote of 2,800 with 606 votes in
3 opposition.

4 The Mojave Water Agency recognized the need to determine water rights because of the higher
5 cost of imported state water. The Mojave Water Agency hired James H. Krieger in 1964 to develop an
6 adjudication plan for the Mojave River Basin to establish water rights and to determine how the
7 entitlement from the State Water Project would be used to insure a sustainable water supply within the
8 area. After the expenditure of a substantial amount of money, this adjudication was dismissed in the
9 1970's due to major disagreement among the Parties.

10 In 1990 a second attempt at adjudication was filed by the City of Barstow, which sought a
11 guaranteed amount of water from the upstream users. A Physical Solution was achieved with
12 agricultural, industrial and municipal water users establishing historic subsurface flows along the river,
13 and historic storm flow based on long term averages (1931-1990). Subsequently, the California
14 Appeals Court and the Supreme Court upheld the adjudication as to the stipulating Parties.

15 In 2019 two stipulating Parties now jeopardize the Judgment and seek to modify the distribution
16 of water supply and allowed water use in this Basin. Both Hesperia and NSRLA have requested the
17 Judgment implementation be delayed or modified, which will affect substantially all stipulating Parties,
18 and will apparently only benefit Hesperia and Water Ski Lake residents' economic interests.

19 Their position can and will have an effect on future economic growth and environmental issues
20 as it affects development in the basin.

21 II.

22 WATERMASTER'S RESPONSE TO OPPOSITION OF CITY OF HESPERIA

23 Hesperia filed an opposition to Watermaster's motion to adjust Free Production Allowance
24 opposing the reduction in FPA for the Alto Subarea. Hesperia relies on the declaration of City
25 Engineer, Michael Thornton in support of its opposition. Mr. Thornton's declaration is factually
26 flawed, fails to provide any data or analysis and instead reaches conclusions based entirely on
27

1 unsupported opinion. The following comments are passages from Mr. Thornton's declaration
2 (italicized) and Watermaster's response.

3 **Thornton Comment**

4 *Para. 11, page 3, line 25: "Although Table 1 indicates that estimated PSY exceeds BAP by 7.1%, I do*
5 *not believe that the Watermaster has adequately addressed all of the issues pertinent to that findings as*
6 *required by the Judgment."*

7 **WM Response**

- 8 • All the elements of water supply and use are considered by Watermaster and evaluated every
9 year and are reported in Watermaster's Annual Report, Declarations and Exhibits prepared for
10 Court by the Watermaster Engineer in Support of Watermaster Motions filed on May 1st with
11 the Annual Report. Data and information considered in the engineer's recommendation is
12 presented to Watermaster at public hearings as required by the Judgment.

13 **Thornton Comment**

14 *Para. 12, Page 4, Lines 1-2: "For example, it is not clear from the records submitted how septic return*
15 *flows in the Alto Subarea are account for."*

16 **WM Response**

- 17 • Return flows for both septic and sewerred parcels are accounted for; septic and sewerred return
18 flow has been addressed in public Watermaster meetings, Watermaster annual reports, and in
19 materials pertaining to Consumptive Water Use and Production Safe Yield posted on the
20 Watermaster's website May 1, 2019, and included in the engineer's declaration. This
21 information was presented in a public workshop, February 27, 2019 and at regular the
22 Watermaster hearings in February and March of 2019.

23 **Thornton Comment**

24 *Para. 13(a), Page 4, line 10: "Initially, the Declaration of Wagner states the obligation from Alto to*
25 *Centro has been met, then later states it is not being met. (Wagner Decl., page 4, line 23.)"*

1 **WM Response**

- 2 • Wagner Decl., page 4, lines 22-23: "There is a detailed accounting of the obligation in the
3 Watermaster annual reports on tables 4-2 and 4-3. As indicated on those tables, the obligation
4 from Alto to Centro has been met." There is no other statement in the Wagner Declaration that
5 states the surface water obligation from Alto to Centro is not being met.

6 **Thornton Comment**

7 *Para.13(c), Page 4, line 15: "2018-2019 Water Year has been one of the wettest on record." "Now*
8 *that the drought has ended..."*

9 **WM Response**

- 10 • Mr. Thornton's statement is provided without evidence
11 • He gives is no definition regarding what constitutes drought, and no basis for his conclusion.
12 • The Physical Solution and Judgment are based on the long-term average water supply (1931-
13 1990). Whatever the water supply conditions are in 2018-2019, they are included in the long-
14 term supply, and the assumption that the 60 year average will repeat.

15 **Thornton Comment**

16 *Para.13(e), page 5, line 17: "Logically, this is likely the result of pumping by R3, and this is why less*
17 *flow is seen at the narrows.*

18 **WM Response**

- 19 • Mr. Thornton's statement is provided without evidence or any basis for his conclusion.
20 • More water has been purchased and recharged under the R-Cubed system (46,071 acre-feet)
21 than has been pumped from the R-Cubed system (26,386 acre feet) during the past 6.5 years.
22 • Water delivered from R-Cubed is delivered in lieu of pumping by other parties. (Victorville,
23 Liberty Utilities, Hesperia Water District, City of Adelanto).
24 • The R3 program has resulted in a net positive recharge above Lower Narrows in Alto
25 • Mr. Thornton ignores the impacts of pumping by City of Hesperia, about 14,259 acre feet per
26 year; accounting for 18.5% of the total Alto pumping.
27

1 **Thornton Comment**

2 *Para. 17, page 8, line 3: "The proposed Rampdown will be prejudicial to the City, inequitable, costly,*
3 *and unfair."*

4 **WM Response**

5 The City of Hesperia was a primary participant, represented by counsel in the development of the
6 Physical Solution and the drafting of the Judgment; the City has been an active participant in the
7 subsequent implementation of the Judgment since 1993-94. Mr. Thornton provides no evidence
8 that the continued implementation of Judgment is inequitable or unfair to the City.

9 In conclusion, Watermaster's proposed motion to reduce FPA is consistent with the Judgment
10 and necessary to ensure continued sustainability in the Alto Subarea. Watermaster's motion to reduce
11 FPA is applied uniformly on all Alto non-agricultural producers, including Hesperia.

12 **III.**

13 **WATERMASTER'S RESPONSE TO OPPOSITION OF**
14 **NEWBERRY SPRINGS RECREATIONAL LAKES ASSOCIATION (NSRLA)**

15 NSRLA is composed of a number of recreational/ski lakes. The Association has about 300
16 permanent and part-time dwellings constructed around lakes. These lakes produce water of which
17 about 1,790 acre-feet of water is lost through evaporation. NSRLA fails to recognize that the
18 Stipulated Judgment treats all users in the adjudicated area on an equal footing. All users are
19 considered equal. California Water Code §106, states that the use of water for domestic purposes is
20 the highest use of water and the next highest use is for irrigation. If the Court were to apply Water
21 Code §106 priority system, recreational use would be the last in line and could be curtailed.

22 Dr. Laton's declaration is once again attached to the NSRLA's filing. Dr. Laton was employed
23 by the Mojave Water Agency in 2005 and submitted his report to the Mojave Water Agency which
24 indicates the Judgment assumptions had not changed relative to subsurface inflow into Baja. Laton
25 said, "The two Subareas are divided by the Harper Lake Fault. Since, Centro has seen no substantial
26 change in water levels then it can be said that no change in flow across the Subarea boundary has
27 occurred. The downward trend water levels in the Baja Subarea can be attributed to excess pumping of

1 groundwater on the downside gradient of the fault.” There has been no effect on storage in the
2 downstream area and no impact on water supply downstream resulting from upstream conditions due
3 to implementation of the Judgment. In addition, meetings continue to be held with cities, water
4 districts, agricultural interests, lakes and individual producers.

5 The General Manager of the Mojave Water Agency as well as Watermaster staff met with
6 representatives of NSRLA several times and also with other producers including cities, water districts,
7 agricultural interests and individual producers. The primary alternative to Rampdown presented by
8 NSRLA and its attorney is a differential Rampdown for Baja producers. This proposal was presented
9 by the NSRLA representative in its individual meetings with staff, as well as at the Watermaster
10 workshops in February, March and May. The proposal by NSRLA would reduce FPA for larger
11 holders of BAP more so than others and result in a delay of reaching production safe yield of three
12 additional years (See Exhibit A). All alternatives presented by producers, not just NSRLA’s, were
13 considered in public session and private meetings with all Parties.

14 NSRLA in its approach to its suggested solution in the Baja Subarea does not have the support
15 of agricultural or the many small producers totaling approximately 4,000 residents. Agricultural, while
16 not embracing any Rampdown or elimination of carryover, would prefer the continued implementation
17 of the terms of the Judgment or the elimination of any further Rampdown. The small producers and
18 well owners (10 acre-feet or less) continue to support Rampdown in Baja to prevent their wells from
19 continuing to drop.

20 In conclusion, Baja has been in an overdraft condition since at least the 1950’s. Baja producers
21 have depleted groundwater storage (falling water levels), destroyed sensitive natural habitats,
22 mobilized sediments that have buried existing structures (blow sand), and threatened the public water
23 supply for the local population.

24 When measured against the average natural “pre-overdraft” water supply, 1931-1951, prior to
25 significant development upstream, Baja pumping has depleted storage by approximately 1.5 million
26 acre-feet. This overdraft condition and its affects occur whether or not there is pumping upstream.

1 The Adjudication was intended to arrest overdraft upstream. To the extent that the Court
2 approves Watermaster's recommendations, the upstream basins will remain in compliance with the
3 Judgment. The problems in Baja are not the result of the Judgment "not working." Rather the Baja
4 community has failed to purchase water to offset overdraft.

5 The alternatives presented both by James and Ellen Johnson and NSRLA, provide no
6 mechanism to purchase water to offset overdraft caused by pumpers in Baja. Instead, both expect
7 someone else to pay for the problems caused by Baja producers; this is apparently the only alternative
8 they will accept. There is no alternative to overdraft in Baja except for the purchase and importation of
9 supplemental water as envisioned by the Physical Solution. In light of the checkered history of failed
10 adjudications, moratoriums, and environmental challenges, the Watermaster is most concerned about
11 the integrity of the Judgment and not jeopardizing its implementation.

12 IV.

13 NSRLA ADDITIONAL COMMENTS

14 A short discussion of the additional comments presented by NSRLA as presented in the
15 workshops held by Watermaster on May 6, 2019 and May 22, 2019 (See Exhibit B) are as follows:

16 Work with DWR to provide more flow

17 The Department of Water Resources is required to release natural inflow that accrues to
18 Silverwood Lake on a real time basis into the Mojave River from the Cedar Springs Dam. The dam is
19 operated by DWR in a manner to ensure that the natural inflow is not disrupted.

20 The Mojave Forks Dam is a federal facility and is ungated. It does not impede storm flows to
21 downstream areas. Any change in the operation or additional construction to the Mojave Forks Dam
22 would involve the federal government and a large expenditure of funds. This would take an act of
23 Congress and is not necessary or advisable. The Mojave Forks Dam is a major flood control facility
24 for the Mojave River corridor.

25 Construct low cost infrastructure to slow and capture river surface flows

26 The Mojave River is a wide sand channel that is subject to episodic flows and does not lend
27 itself to the use of rubber dams, sand dikes and other methods to control storm flows. Additionally

1 most of the riverbed area is privately owned. Interference with storm flows is currently prohibited
2 within the Judgment, except for flood control purposes. These ideas should be presented to the
3 Technical Advisory Committee of the Mojave Water Agency for discussion and vetting as has been
4 done in the past.

5 User fees within the entire Basin should be charged and dedicated to infrastructure

6 The Mojave Water Agency constructed a 76 mile pipeline at the cost of \$60,000,000 which
7 runs along the river from the Victorville area in Alto Subarea to the Centro and Baja Subareas to
8 deliver supplemental water. To date, the only entity which has taken advantage of this pipeline and
9 delivery of supplemental water has been the Mojave Water Agency which has spread 30,154 acre-feet
10 in Centro and 18,213 acre-feet in Baja. The costs of spreading water and construction of the four
11 recharge sites in Centro and Baja along the pipeline have been borne by the Mojave Water Agency.
12 Any additional user fee or tax would be contrary to the Stipulated Judgment (See paragraph 13 and 22
13 of the Judgment). In addition to the Mojave River Pipeline and its spreading areas, the Mojave Water
14 Agency constructed the Morongo Basin Pipeline delivering water to the upper Alto area at two
15 recharge locations. The Mojave Water Agency continues to consider other options, especially in the
16 Baja area to reduce pumping and provide for supplemental water. The Watermaster does not have
17 funding for construction projects as envisioned by NSRLA. The infrastructure currently exists to
18 deliver water to the Centro and Baja Subareas.

19 Future Studies for Spreading Basins.

20 The Watermaster engineer continues to study the system and the Mojave Water Agency
21 continues to study and examine further alternatives. See Exhibit C as to the many studies conducted
22 by Mojave Water Agency, State of California Fish & Wildlife and others. Additional studies will not
23 provide an immediate solution to the water ski lakes or the Baja Subarea. Additional studies will not
24 provide additional water.

25 Construction of Additional Recharge Basins

26 As previously stated, the Mojave Water Agency has constructed two recharge basins in Centro
27 and two in Baja. Baja has not purchased supplemental water to spread in the Baja Subarea. Instead,

1 Baja continues to mine water from the Subarea resulting in more than 400,000 acre-foot draw down
2 since implementation of the Judgment. Additional recharge basins will not result in additional
3 recharge unless parties in Baja purchase water. This is done by reducing the Free Production
4 Allowance.

5 Piecemeal Management

6 NSRLA's reference to piecemeal management attempts to shift the burden of solving Baja's
7 problem to the upper basin Parties. In order to implement such an idea, NSLRA would need
8 agreement of the upper basin Parties to purchase water for Baja. Paragraph 22 of the Judgment
9 indicated that the adjudicated area is managed with each Subarea having its own set of obligations and
10 responsibilities.

11 Carryover Water Change

12 Any change in the method of carryover or its administration jeopardizes the Judgment.
13 Carryover water will eventually be transferred and disappear with continued reduction in FPA per the
14 Judgment.

15 Differential Rampdown

16 A differential Rampdown is not equitable pursuant to Paragraph 23 (a) of the Judgment. A
17 similar proposal (2015) was submitted to the Court and was rejected by Judge Trask because it did not
18 comply with the Judgment, would fail to achieve sustainability more efficiently, was not equitable and
19 did not provide relief to minimal producers in the area due to continued depletion of storage. A Baja
20 differential Rampdown is not supported by Agriculture which represents 70% of water production in
21 Baja. Minimal producers are also opposed and prefer that the Judgment be implemented. Without a
22 unanimous position in the Baja Subarea as to a differential Rampdown, the terms of the Stipulated
23 Judgment should remain in effect.

24 V.

25 DAMS IN THE UPPER MOJAVE WATERSHED

26 There are two independent dams in the upper Mojave River Watershed. The Mojave Forks
27 Dam, an ungated flood control facility operated by the US Army Corps of Engineers, and Cedar

1 Springs Dam, operated by the California Department of Water Resources as part of the State Water
2 Project (see attached diagram, Exhibit D). These facilities are separate, have independent functions,
3 and are specifically operated to avoid impeding natural inflow to the Mojave Basin Area.

4 The earliest investigation into damming along the Mojave River was in 1875. The Mojave
5 Forks Dam was authorized by act of Congress, specifically the Flood Control Act of 1960, approved
6 July 14, 1960. The Army Corps of Engineers and Bureau of Reclamation planned the dam from 1960
7 to 1965. Construction began in 1967 and the dam was completed in May 1971 with the permanent
8 operating equipment completion in November 1974. It was designed to contain a flood of 94,000
9 cubic feet per second (cfs) with a maximum outflow of 23,500 cfs and is usually drained within 2-3
10 days of a flooding event. Only flows greater than 7,300 cfs are attenuated. It is noted that the dam was
11 completed nearly 25 years before entry of Judgment in January 1996. The Mojave Basin Area
12 Watermaster, MWA, parties in the upper basins do not own the flood control facility, do not operate it,
13 and have no influence over its function. The facility is independent of the Judgment and is a base line
14 condition within the Mojave Basin Area.

15 Paragraph 18 of the Judgment (Injunction Against Diverting Storm Flows) states, "No Party
16 may undertake or cause the construction of any project that will directly reduce the amount of Storm
17 Flow that would otherwise go through the naturally occurring hydrologic regime to a downstream
18 Subarea or that will reduce the surface area over which Storm Flow currently occurs by alteration to
19 the bed of the Mojave River. This paragraph shall not prevent any flood control agency or municipality
20 from taking such emergency action as may be necessary to protect the physical safety of its residents
21 and its structures from flooding. Any such action shall be done in a manner that will minimize any
22 reduction in the quantity of Storm Flows."

23 The Cedar Springs Dam is part of the State Water Project (SWP) and is operated by the
24 California Department of Water Resources (DWR). The Cedar Springs Dam created the SWP
25 Reservoir known as Silverwood Lake. It too was completed in 1971 and DWR began filling the area
26 behind the dam in January 1972 with water pumped over the Tehachapi's at the Edmonston Pumping
27 Plant. DWR measures the natural inflow into Silverwood Lake and this volume of water is released

1 into the West Fork of the Mojave River with the intention of mimicking the natural inflows into the
2 river. Cedar Springs Dam is not part of any conservation storage for natural inflow from the
3 watershed.

4 Since completion of the Mojave Forks Dam, there have been eight (8) Water Years where the
5 flows as recorded by the USGS stream gages at Deep Creek (10260500) and the West Fork
6 (10260950) have been greater than 7,300 cfs, 1977-78, 1979-80, 1982-83, 1992-93, 1994-95, 1997-98,
7 2004-05, and 2010-11. Consistent with pre-construction modeling by the USGS (Durbin and Hardt,
8 1974) the flood control operations attenuate flood flows only by hours and at most 1-3 days. Durbin
9 and Hardt reported the peaks of the storms are reduced but not the volume of water moving
10 downstream to Barstow. In 1980, USGS studied the effects of the flood control activities on the floods
11 of 1978 and concluded the flood control structure may have increased the recharge to downstream
12 areas by reducing outflow from the basin (*Aquifer Recharge for the 1969 and 1978 Floods in the*
13 *Mojave River Basin, California, USGS, 1980, Buono and Lang*).

14 Exhibit E, attached, was prepared by Mr. Wagner, Watermaster Engineer and shows the
15 recharge in Baja from the Mojave River as a percentage of flow measured at the Forks Dam. The
16 Exhibit shows that recharge from the river has remained the same or increased. Baja overdraft has not
17 resulted from the effects of the Dams.

18 VI.

19 **WATERMASTER'S SUPPLEMENTAL POINTS AND AUTHORITIES ON MOTION TO** 20 **ADJUST FREE PRODUCTION ALLOWANCE FOR WATER YEAR 2019-2020**

21 As part of the process leading up to filing its motion, the Watermaster conducted public
22 hearings on February 27, 2019 and March 27, 2019 and adopted the FPA recommendations for the five
23 Subareas for Water Year 2019-20 as follows:

Subarea

2019-20 FPA Recommendation

| | |
|-------------------------------|------------|
| Alto - Agriculture | 80% of BAP |
| Alto - Municipal & Industrial | 55% of BAP |
| Baja | 30% of BAP |
| Centro | 80% of BAP |
| Este ¹ | 80% of BAP |
| Oeste | 75% of BAP |

1. FPA to be set at 80% of Base Annual Production for the 2019-20 Water Year. The Este Subarea may be subject to future Rampdown to 65% immediately if water use conditions change.

Watermaster received and considered oral comments and correspondence from the Department of Fish and Wildlife and other producers within the Subareas. As suggested by the Court, Watermaster also held four public workshops related to Watermaster's adjustment to Free Production Allowance, one on February 27, 2019 related to the preliminary update to consumptive use and production safe yield, the second related to Watermaster's adopted recommendations for Alto, Este and Oeste on April 22, 2019, a third on May 6, 2019 related to Watermaster's adopted recommendations for Centro and Baja and to allow input and discussion on alternatives submitted by parties at previous hearings and the fourth on May 22, 2019 to summarize the workshops to the Watermaster Board and allow discussion and feedback. The workshop flier and the PowerPoint presentations from the April and May workshops are attached as Exhibit F. Additional correspondence was received at the workshop on May 6, 2019 and May 22, 2019 from the Newberry Springs Recreational Lakes Association and is attached as Exhibit B.

Watermaster solicited opinions of the parties and considered alternatives to Rampdown, and other suggestions for establishing and maintaining sustainability in the Subareas. Alternatives were received and compiled and evaluated for consistency with the Judgment and in consideration of preserving the Judgment as the operative management tool for the Mojave Basin Area.

In some cases, alternatives and suggestions were directly contrary to the Judgment, would inequitably effect some parties in favor of others, would provide no benefit to the Basin, or relief to

1 overdraft. Some party's supported Watermaster's recommendations or asked only for a delay of one
2 year, or offered an alternative schedule. The alternatives and suggestions presented to Watermaster are
3 included along with a brief comment as to the effectiveness or consistency with the Judgment.

4 **CONSISTENT WITH THE JUDGMENT**

5 **Alto--Proposed Alternative**

6 Rampdown of all Alto Producers including Agriculture to 55%

- 7 • Consistent with the Judgment
- 8 • Court imposed the differential Rampdown currently in place
- 9 • Court could change its order
- 10 • Impacts of Agricultural Producers staying at 80% are minimal. Agricultural production
11 is less than 500 acre-feet in Alto and almost all excess FPA is transferred to Municipal
12 and Industrial Producers and adjusted to the current Rampdown percentage.

13 **Baja--Proposed Alternative**

14 Purchase and Retire BAP and Carryover rights

- 15 • Sources of financing needed

16 Continued Rampdown pursuant to Judgment

- 17 • Supported by Minimal Producers
- 18 • Supported by California Department of Fish and Wildlife
- 19 • Consistent with the Judgment
- 20 • Quickest option to reach Production Safe Yield (3 years)
- 21 • Eliminates Carryover quicker, requiring supplemental water to be purchased

22 **NOT CONSISTENT WITH THE JUDGMENT**

23 **Alto--Proposed Alternative**

24 Postpone Alto Rampdown for another year

- 25 • Not consistent with the Judgment
- 26 • Exhibit H requires the reduction immediately

Oeste--Proposed Alternative

Rampdown to 75% for all producers for 2019-20. Remain at 75% for 2020-21 through 2023-24, thereafter, Rampdown at 1% per year for five years beginning in 2024-25 and ending in 2028-29.

- Not consistent with the Judgment
- Additional Rampdown more than 10% may be needed

Baja--Proposed Alternatives

Differential Rampdown in Baja (Using a tiered approach based on BAP)

- Not consistent with the Judgment. Not equitable pursuant to Paragraph 23 (a) of the Judgment. Similar 2015 proposal submitted to the Court was rejected by Judge Trask because it did not comply with the Judgment, would fail to achieve sustainability more efficiently, was not equitable and did not provide relief to minimal producers in the area due to continued depletion of storage.
- Would take 3 additional years to reach Production Safe Yield
- Supported by Lake Owners and Baja Subarea Advisory Committee (3/2 vote)
- Not supported by Agricultural producers, is not equitable
- Potential for misuse of tiers – difficult to administer
- Would require modification to the Judgment

No Further Rampdown in Baja Subarea (Prior to reaching Production Safe Yield)

- Supported by Agriculture
- Not consistent with Paragraph 22 of the Judgment
- Baja overdraft would continue, Production Safe Yield would not be achieved and supplemental water would not be purchased
- Inconsistent with the Sustainable Groundwater Management Act

Increase BAP for Municipal Users to 100% or individually to what they require annually

- Not consistent with the Judgment. Not equitable pursuant to Paragraph 23 (a) of the Judgment.
- Supported by one municipal purveyor

1 • Would encourage other parties to request the same treatment

2 Revise Baja boundary line east of Daggett

3 • Would require modification to the Judgment.

4 • Would jeopardize the boundary lines set in the Judgment

5 • Would encourage other parties to request the same treatment

6 • Not consistent with the Judgment

7 • Supported by one municipal purveyor

8 Rampdown all Subareas equally

9 • Paragraph 22 of the Judgment requires that each Subarea be adjusted individually to
10 reach Production Safe Yield

11 • Supported by some as an equitable approach

12 • Would require modification to the Judgment

13 Ordinance is needed restricting upstream development

14 • San Bernardino County engagement is required

15 • Watermaster has no control over land use or development

16 • Not consistent with the Judgment

17 Ordinance is needed restricting new production on fallowed land

18 • San Bernardino County engagement is required

19 • Watermaster has no land use control

20 • Not consistent with Paragraph 39 of the Judgment

21 • May help with reducing future production

22 Clear plant growth in the Alto Transition Zone river area to allow more water to flow down river

23 • Department of Fish and Wildlife engagement is required

24 • Not consistent with the Judgment, Exhibit H

25 Limit reduction of production rights for all producers to 10 acre-feet

26 • Not consistent with the Judgment. Not equitable pursuant to Paragraph 23 (a) of the
27 Judgment.

1 • Would require modification to the Judgment

2 Judgment amendment to address carryover

3 • Objectives have not been defined

4 • Not consistent with the Judgment

5 • Not supported by all parties

6 • Would require a modification to Paragraph 11 of the Judgment

7 Further studies

8 • Sources of financing needed

9 • Objectives have not been defined

10 Institute Fees to help downstream Subareas

11 • Not consistent with the Judgment. Not equitable pursuant to 23 (a) of the Judgment

12 • Not consistent with the Judgment, Paragraph 22, responsibility lies with producers
13 paying for replacement water within each Subarea

14 • Potential for Mojave Water Agency to institute fees separately

15 FPA to be set categorically for all Subareas by use type

16 • Not consistent with the Judgment. Not equitable pursuant to Paragraph 23 (a) of the
17 Judgment

18 • Would require modification to the Judgment

19 Purchase and/or use of supplemental water in the Baja Subarea

20 • Sources of financing needed

21 • Objectives have not been defined

22 • Not consistent with the Judgment, Paragraph 22, responsibility lies with producers
23 paying for replacement water within each Subarea

24 The only solutions to chronic overdraft and to achieving sustainability is to purchase imported
25 water or to reduce pumping. The Alto and Centro Subareas have significantly reduced pumping. The
26 Alto Subarea has purchased supplemental water, maintained the Transition Zone and with further FPA
27 reduction to 55% will purchase additional water necessary to reduce the annual deficit to zero. The

1 Baja Subarea has been over-pumped in excess of Subarea yield for at least 70 years. In order for
2 pumping to continue at today's rate, the parties in Baja will need to purchase supplemental water to
3 arrest overdraft. The Baja parties' alternatives do not include a recommendation for funding
4 supplemental water purchases; the Judgment is intended to accomplish that very thing, by assessing
5 producers who pump in excess of their FPA.

6 **VII.**

7 **CONCLUSION**

8 In conclusion, only two of the options presented comply with the Judgment. All other ideas or
9 proposals would require changes to the Judgment and would result in significant inequity or a shifting
10 of responsibility to one group in favor of another and may result in risk to the entire Judgment. A
11 substantial amount of investment by all parties to the Judgment has occurred over the last 27 years.
12 The Mojave Water Agency, in support of the physical solution, constructed water supply facilities for
13 delivering and storing water from the State Water Project to meet needs in every Subarea. These
14 include 13 recharge facilities and two major pipelines nearly 150 miles in length. The physical
15 solution will work under the Judgment if implemented to its fullest extent. Further delays in
16 implementation will jeopardize basin sustainability, particularly in Baja.

17
18 Dated: May 30, 2019

BRUNICK, McELHANEY & KENNEDY PLC

19
20 BY: William J. Brunick
21 WILLIAM J. BRUNICK, ESQ.
22 LELAND P. McELHANEY, ESQ.
23 Attorneys for Defendant/Cross-Complainant,
24 MOJAVE WATER AGENCY
25
26
27

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

I am employed in the County of Sacramento, State of California. I am over the age of 18 years and am not a party to the within action; my business address is 2151 River Plaza Drive, Suite 300, Sacramento, California 95833-4130.

On July 1, 2020, I served the following document(s) described as **DECLARATION OF WESLEY A. MILIBAND IN OPPOSITION TO THE PROPOSAL TO VACATE THE STAY OF RAMPDOWN TO REDUCE THE MUNICIPAL AND INDUSTRIAL FREE PRODUCTION ALLOWANCE TO 60% IN THE OESTE SUB-AREA FOR WATER YEAR 2020-2021** on the interested parties in this action as follows:

By email or electronic transmission to the Watermaster and its counsel at the email addresses listed below, and I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful;

By messenger service to the Watermaster; I served the documents by emailing them First Legal Services, a professional messenger service for service; A Declaration of Messenger will subsequently be filed; and Via, Watermaster to all parties to the action, pursuant to the Judgment of this case and the Mojave Basin Area Watermaster's Rules and Regulations paragraph 8.B which provides that service to be the responsibility of the Watermaster and paragraph 10.D, which provides that a party's service obligation is satisfied upon delivery of a copy of the conformed documents as filed with the Court. As of today, the Watermaster has not set a service fee. Per the Watermaster's request, I will cause a check to be delivered to Watermaster upon being notified of the Watermaster's service costs.

Mojave Basin Area Watermaster
c/o Valerie L. Wiegenstein,
Watermaster Services Manager
13846 Conference Center Drive
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watermaster@mojavewater.org

☒ **BY MAIL:** I placed a true and correct copy of the document(s) in a sealed envelope for collection and mailing following the firm's ordinary business practices. I am readily familiar with the firm's practice for collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid. *Code of Civil Procedure, Section 1013a.*

William J. Burnick Leland P. McElhaney
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 1, 2020, at Sacramento, California.



Elena Barnett



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Delivery Confirmation

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| New Case | Case Number | Case Type | Court Location | |
| No | 208568 | Civil | Riverside | |
| Fee Waiver or Other Exemption | | | | |
| Exempt Pursuant to G.C. §6103 | | | | |
| Filing as an Attorney | Bar Number | Attorney for | | |
| Yes | 241283 | Phelan Piñon Hills Community Services District | | |
| Documents | | | | |
| 1 Substitution of Attorney | | | | |
| 2 Declaration | | | | |
| 3 Declaration | | | | |
| Notes / Special Instructions | | | | |
| | | | | |
| IMPORTANT: This document serves as a confirmation of delivery only and the submitted documents have not yet been processed and/or filed by the Superior Court of California, County of Riverside. | | | | |

PROOF OF SERVICE

**STATE OF CALIFORNIA }
COUNTY OF SAN BERNARDINO}**

I am employed in the County of the San Bernardino, State of California. I am over the age of 18 and not a party to the within action; my business address is 13846 Conference Center Drive, Apple Valley, California 92307.

On July 2, 2020, the document(s) described below were served pursuant to the Mojave Basin Area Watermaster's Rules and Regulations paragraph 8.B.2 which provides for service by electronic mail upon election by the Party or paragraph 10.D, which provides that Watermaster shall mail a postcard describing each document being served, to each Party or its designee according to the official service list, a copy of which is attached hereto, and which shall be maintained by the Mojave Basin Area Watermaster pursuant to Paragraph 37 of the Judgment. Served documents will be posted to and maintained on the Mojave Water Agency's internet website for printing and/or download by Parties wishing to do so.

Document(s) filed with the court and served herein are described as follows:

DECLARATION OF WESLEY A. MILIBAND IN OPPOSITION TO THE PROPOSAL TO VACATE THE STAY OF RAMPDOWN TO REDUCE THE MUNICIPAL AND INDUSTRIAL FREE PRODUCTION ALLOWANCE TO 60% IN THE OESTE SUB-AREA FOR WATER YEAR 2020-2021

 X (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July 2, 2020 at Apple Valley, California.



Valerie Wiegstein

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Mojave Basin Area Watermaster Service List as of July 02, 2020

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Mojave Basin Area Watermaster Service List as of July 02, 2020

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