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*Exempt from filing fee pursuant to
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MOJAVE WATER AGENCY

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **IN AND FOR THE COUNTY OF RIVERSIDE**

11 CITY OF BARSTOW, et al
12 Plaintiff,

13 v.

14 CITY OF ADELANTO, et al
15 Defendant.

16 _____
17 AND RELATED CROSS ACTIONS
18 _____

CASE NO.: CIV 208568

**NOTICE OF SERVING THE
COURT'S SEPTEMBER 16, 2022
ORDER (1) DISCHARGING ORDER
TO SHOW CAUSE WHY THE FPA
OF ALTO SHOULD NOT BE
REDUCED BY ANOTHER 4.5% OF
BAP (2) REDUCING THE FPA IN
ALTO BY ANOTHER 0.1% OF BAP
and (3) DIRECTING THE
WATERMASTER TO RE-
EVALUATE PSY FOR THE ENTIRE
BASIN, AND PROOF OF SERVICE
THEREON**

Assigned for All Purposes to:
Hon. Craig G. Riemer, Judge Presiding
Dept. 1

21 **PLEASE TAKE NOTICE THAT** pursuant to the Court's direction,
22 defendant/cross-complainant, Mojave Water Agency in its role as Watermaster, hereby
23 serves the Court's Order (1) Discharging Order to Show Cause Why the FPA of Alto Should
24 Not Be Reduced by another 4.5% of BAP, (2) Reducing the FPA in Alto by an additional
25 0.1% of BAP, and (3) Directing the Watermaster to Re-Evaluate PSY for the Entire Basin.

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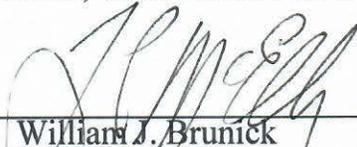
**NOTICE OF SERVING THE COURT'S SEPTEMBER 16, 2022 ORDER (1) DISCHARGING ORDER TO SHOW CAUSE WHY THE FPA
OF ALTO SHOULD NOT BE REDUCED BY ANOTHER 4.5% OF BAP (2) REDUCING THE FPA IN ALTO BY ANOTHER 0.1% OF BAP
AND (3) DIRECTING THE WATERMASTER TO RE-EVALUATE PSY FOR THE ENTIRE BASIN, AND PROOF OF SERVICE
THEREON**

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A copy of the Court's September 16, 2022 Order is attached hereto as Exhibit A.

Dated: September 19, 2022

BRUNICK, McELHANEY & KENNEDY PLC

By:  _____

William J. Brunick
Leland P. McElhaney
Attorneys for Defendant/Cross-complainant,
MOJAVE WATER AGENCY

NOTICE OF SERVING THE COURT'S SEPTEMBER 16, 2022 ORDER (1) DISCHARGING ORDER TO SHOW CAUSE WHY THE FPA OF ALTO SHOULD NOT BE REDUCED BY ANOTHER 4.5% OF BAP (2) REDUCING THE FPA IN ALTO BY ANOTHER 0.1% OF BAP AND (3) DIRECTING THE WATERMASTER TO RE-EVALUATE PSY FOR THE ENTIRE BASIN, AND PROOF OF SERVICE THEREON

EXHIBIT “A”

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

CASE TITLE: City of Barstow v. City of Adelanto CASE NO.: CIV208568 DATE: September 16, 2022	Department 1	<div style="font-size: 2em; font-weight: bold; letter-spacing: 0.5em;">FILED</div> SUPERIOR COURT OF CALIFORNIA COUNTY OF RIVERSIDE SEP 16 2022 <i>L. Howell</i>
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PROCEEDING: Order (1) Discharging Order to Show Cause Why the FPA of Alto Should Not Be Reduced by Another 4.5% of BAP, (2) Reducing the FPA in Alto by Another 0.1% of BAP, and (3) Directing the Watermaster to Re-Evaluate PSY for the Entire Basin

Background:

In its order filed 6-3-22, the Court reduced the FPA in the Alto Subarea from 55% to 54.5, a reduction of 0.5%. In addition, the Court ordered all interested parties “to appear on August 25, 2022, at 1:30 P.M. in Department 1 and show cause, if any exists, why the Free Production Allowance for Alto should not be reduced by another 4.5% for Water Year 2022-2023.” That return date was later continued to September 16 2022.

Responses to the that OSC were filed by the Watermaster (on 6-28-22), the California Department of Fish and Wildlife (on 8-4-22), Mitsubishi Cement Corporation (on 8-4-22), the Silver Lakes Association (on 8-5-22), and the CalPortland Company (on 9-6-22). In addition, the Watermaster filed a reply to the DF&W’s response (on 8-5-22). After considering the arguments raised in those responses, the Court issued a tentative ruling substantially the same as this order. No oral arguments, objections, or opposition was offered at the hearing on the OSC.

Order:

Accordingly, the Court rules as follows:

The order to show cause is discharged.

The free production allowance for all producers in the Alto Subarea is reduced by an additional 0.1 percent, for a total reduction of 0.6 percent, to 54.4 percent of BAP for Water Year 2022-2023.

The Watermaster shall re-evaluate the PSY for each of the five subareas in the basin. If possible, that new formulation shall be the foundation of the recommendations for adjustments to FPA for the Water Year 2023-2024. If that re-evaluation cannot be completed soon enough to be used for that purpose, it shall be completed as soon as possible and the Court’s approval shall be sought as soon as possible thereafter.

Analysis:

There Is No Procedural Impediment to a Reduction of FPA Below PSY

The judgment requires the Watermaster to make annual recommendations to the court to adjust FPA “if needed.” (¶ 24(o).) In determining whether an adjustment is needed, the

Watermaster must “be guided by the factors set forth in Exhibit ‘C’” (§ 24(o).) The scope of those factors is broad. They include “all pertinent hydrologic data and estimates,” changes in storage, changes in the factors listed in Table C-1, and the factors listed in § 2.a of Exhibit H. (Exhibit C, ¶ A.)

Beyond necessity, there are only two restrictions on placed on the Watermaster when deciding upon its recommendations to the Court. First, paragraph 24(o) provides that the Watermaster cannot recommend a reduction in FPA for a Subarea in an amount that would “exceed five percent of the aggregate Base Annual Production of that Subarea.” Second, paragraph 2.a. of Exhibit H provides that the Watermaster must “compare the Free Production Allowance with the estimated Production Safe Yield. In the event the Free Production Allowance exceeds the estimated Production Safe Yield by five percent or more, Watermaster shall recommend a reduction of the Free Production Allowance equal to a full five percent of the aggregate Subarea Base Annual Production.”

The restrictions placed upon the Court when ruling on those recommendations are few. If the Watermaster recommends a change, the Court must “conduct a hearing, after notice given by Watermaster according to paragraph 36, upon Watermaster’s recommendations and may order such changes in Subarea Free Production Allowance.” (*Ibid.*)

However, the judgment contemplates annual recommendations to the Court by the Watermaster. (§ 24(o).) So do the Watermaster’s own rules. (Rule 15.) Moreover, those rules require the Watermaster to give notice of its preliminary recommendation, conduct a public hearing concerning that preliminary recommendation, and then make a final recommendation to the Court, all by prescribed dates. The Watermaster did not, in either its preliminary or final recommendation, recommend that the FPA for Alto be reduced below PSY. Indeed, it did not recommend any reduction for Alto whatsoever. Because it did not recommend a reduction by the prescribed deadlines, and because therefore no notice was given of any such potential reduction, the Watermaster asserts that the Court cannot reduce the FPA below PSY at this procedural juncture.

Two premises appear to underlie that conclusion. One is that, unless the Watermaster first makes a recommendation concerning a subarea’s FPA, the Court cannot adjust the FPA. The Court agrees. (§ 24(o).)

The second premise appears to be that, when considering what adjustment should be made, the Court is somehow limited by the Watermaster’s recommendation. Specifically, the Watermaster opines: “Subsection (o) does not authorize a reduction in FPA where, as here, the Watermaster has not recommended a further reduction in FPA.” (Reply to DF&W, p. 2.) With that premise, the Court does not agree.

The Court’s role is not simply to approve or veto the Watermaster’s recommendation. To the contrary, the judgment provides that “[t]he Court’s review shall be de novo and the Watermaster[’s] decision or action shall have no evidentiary weight in such proceeding.” (§ 36(d).) In other words, the Court is not bound by the recommendation of the Watermaster as to

what changes are or are not necessary. Instead, the Court is charged with drawing its own conclusions from the evidence, which may differ from the Watermaster's conclusions.

In short, while the Court cannot act until the Watermaster has submitted its recommendations, and while the Court must conduct a noticed hearing on those recommendations, the Court thereafter can make whatever adjustment is called for by the Court's interpretation of the evidence, limited only by the 5%-per-annum maximum reduction.

The Court has implicitly applied that interpretation of the judgment repeatedly when ruling on the last four annual adjustment motions, regarding both Alto and other subareas.

- In 2019, the Watermaster recommended that the FPA for agricultural producers in Alto remain at 80%. The Court instead reduced it to 75%. In the same motion, the Watermaster recommended that the FPA for both Centro and Este remain at 80%. The Court rejected those recommendations and reduced both to 75%.
- In 2020, the Watermaster recommended that the FPA for agricultural producers in Alto be reduced to 70%. The Court instead reduced it to 65%. At the same time, the Watermaster recommended that Oeste be reduced to 70%. Instead, the Court reduced it to 65%, and abolished the differential rampdowns between agricultural producers and M&I producers in Oeste.
- In 2021, contrary to the recommendation of the Watermaster regarding Alto, the Court eliminated the differential between agricultural producers and M&I producers, and imposed a reduction to 55%. In the same order, the Court rejected the recommendation that Baja be reduced to 20%, and instead reduced it to 22.5%.
- In 2022, the Watermaster recommended that Baja stay at 22.5%. Instead, the Court reduced its FPA to 20%.

Thus, over the last four water years, the Court has sometimes adopted the Watermaster's recommendations, sometimes imposed a lesser reduction than recommended, and sometimes imposed a greater reduction. Occasionally, it also restructured the rampdowns by eliminating pre-existing differentials between different types of users, without any recommendation by the Watermaster to do so. Were the Watermaster's interpretation of the judgment correct, then the Court acted beyond its authority every time that its order varied from the Watermaster's recommendation. Neither the Watermaster nor any other party has ever questioned the Court's authority to order reductions in the FPA that differ from what the Watermaster has recommended. That silence is an implicit acknowledgement that the Court is not limited by the nature of the Watermaster's recommendation, or by the extent of the recommended reduction, but only by whether the Watermaster has made a recommendation regarding that subarea's FPA for the Court to consider.

Here, the Watermaster recommended that no adjustment be made to the FPA for Alto. The issue of whether any adjustment of Alto's FPA was needed was thereby put on the table for decision. Notice was given of the Watermaster's annual adjustment motion. After the hearing on that motion on 6-2-22, the Court determined that it would hold an additional hearing on 8-25-22

concerning the specific issue of whether Alto's FPA should be reduced below PSY. (Order of 6-3-22.) That hearing was ultimately continued to 9-16-22, and notice of that continuance was given. That is more than sufficient to satisfy the notice requirement in paragraph 36, which does not prescribe any minimum period of notice at all.

The procedural prerequisites of a recommendation and notice having been satisfied, the Court may decide at this time whether Alto's FPA should be reduced to a level below the currently estimated PSY.

Substantive Restrictions on the Reduction of FPA Below PSY

The Court agrees with Mitsubishi that the judgment does not contemplate reductions in FPA below PSY. Although the judgment does not expressly state such a limitation, the underlying theme of the physical solution is that the parties have the right to produce water for beneficial use up to FPA so long as that level of production is sustainable. As the judgment puts it: "A fundamental premise of the Physical Solution is that all Parties will be allowed, subject to this Judgment, to Produce sufficient water to meet their reasonable beneficial use requirements. To the extent that Production by a Producer in any Subarea exceeds such Producer's share of the Free Production Allowance of that Subarea, Watermaster will provide Replacement water to replace such excess Production according to the methods set forth herein." (Judgment, ¶V(A)(22).) The "sustainable" level of production is the PSY. Thus, the parties have the right to produce without charge up to the PSY. The language of the statement of decision confirms that there is no power to rampdown FPA below PSY.

Re-Evaluating PSY

PSY is defined as "[t]he highest average Annual Amount of water that can be produced from a Subarea: (1) over a sequence of years that is representative of long-term average annual natural water supply to the Subarea net of long-term average annual natural outflow from the Subarea, (2) under given patterns of Production, applied water, return flows and Consumptive Use, and (3) without resulting in a long-term net reduction of groundwater in storage in the Subarea." (Judgment, ¶II(A)(4)(aa).)

Over the last three years, Alto's FPA has been reduced to just above PSY. Nevertheless, the storage levels have continued to drop, just as they have been for the last 10 years. If FPA is reduced to PSY, but groundwater storage is still declining notwithstanding the purchase and supply of replacement water, it's logical to question whether the PSY calculations are founded on correct assumptions.

For instance, the present calculation of PSY has been based on a 60-year study of flows from 1930 to 1990. The Court questions whether a 60-year period in the middle of the 20th century is still an appropriately representative period from which to measure the long-term averages specified in the definition of PSY, especially given the 32 years that have passed since 1990 and the climatic disruptions that we have been experiencing during that time.

If that is not the most representative period, should a different period be defined? Mr. Wagner has stated that, if the judgment were being negotiated today, it would be more prudent to select "a shorter, drier planning period (hydrologic base period) for local supply . . . , resulting in a

lower estimated Production Safe Yield and consequently lower annual Free Production Allowance.” (Wagner Decl., p. 6, ll. 18-21.) Is the Watermaster bound to rely upon what appears at this point in time to be a less-than-prudent period?

The Court acknowledges that the Watermaster re-evaluated PST three years ago. However, in his 2019 declaration, Mr. Wagner suggests that the changes were largely driven by changes in consumptive use, and did not consider changes in supply. At the time he stated:

Periodic updates to PSY are necessary to capture changes in land use that may occur over time. Irrigation patterns, cropping, general land uses, consumptive use of water and patterns of return flow for example affect PSY. **The long-term average annual supply is generally based on the period 1930-31 to 1989-90.** The PSY update is focused on changes in consumptive uses from those reported by Webb [Albert. A. Webb and Associates]. The consumptive use is evaluated annually by the Watermaster Engineer and reported in Chapter 3 of the annual report....

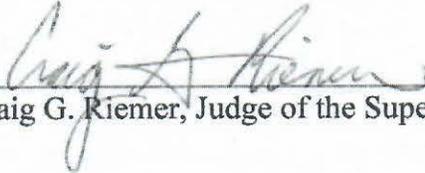
The current PSY estimate includes long-term water supply as specified in the Judgment, consumptive uses for 2017-2018, phreatophyte use as indicated in the Judgment, Subarea subsurface obligations and surface obligations....

(2019 Wagner declaration, p. 3, ll. 5-17, emphasis added.) Thus, the 2019 re-evaluation appears to re-evaluate all of the relevant factors except for supply. Why, with an additional and more recent 30 years of data, should the PSY calculation continue to rely upon the prior 60-year period for defining the long-term average? At the very least, should not the past 32 years of data be added to the original 60 years?

For all these reasons, the Court declines to order rampdown of FPA below PSY. Instead, the Court will order FPA to equal to PSY, by reducing FPA by an additional 0.1 percent to 54.4%, and shall order the Watermaster to re-evaluate PSY in all subareas as part of its annual motion in June of 2023.

SERVICE

Counsel for the Watermaster shall serve copies of this order on all parties by mail forthwith, and shall file a proof of service within seven days of the date of mailing.



Craig G. Riemer, Judge of the Superior Court

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.

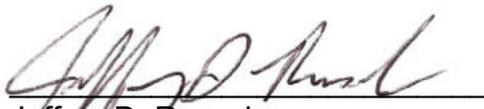
On September 19, 2022, the document(s) described below were served pursuant to the Mojave Basin Area Watermaster's Rules and Regulations paragraph 8.B.2 which provides for service by electronic mail upon election by the Party or paragraph 10.D, which provides that Watermaster shall mail a postcard describing 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:

NOTICE OF SERVING THE COURT'S SEPTEMBER 16, 2022 ORDER (1) DISCHARGING ORDER TO SHOW CAUSE WHY THE FPA OF ALTO SHOULD NOT BE REDUCED BY ANOTHER 4.5% OF BAP (2) REDUCING THE FPA IN ALTO BY ANOTHER 0.1 % OF BAP and (3) DIRECTING THE WATERMASTER TO REEVALUATE PSY FOR THE ENTIRE BASIN, AND PROOF OF SERVICE THEREON

 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 September 19, 2022 at Apple Valley, California.



Jeffrey D. Ruesch

Mojave Basin Area Watermaster Service List as of September 19, 2022

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Mojave Basin Area Watermaster Service List as of September 19, 2022

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Mojave Basin Area Watermaster Service List as of September 19, 2022

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Mojave Basin Area Watermaster Service List as of September 19, 2022

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