


# EXHIBIT 4

**Antelope Valley Watermaster Board**  
**Special Meeting Agenda**  
**Wednesday, November 15, 2017 – 10:00 a.m.**  
**Location: Antelope Valley – East Kern Water Agency**  
**6500 West Avenue N, Palmdale, CA 93551**  
**Teleconference: (571) 317-3112    Access Code: 697-408-885**

**BOARD OF DIRECTORS**

Robert Parris, AVEK Water Agency – Chairperson  
Dennis Atkinson, Landowners – Vice Chairperson  
Adam Arika, Los Angeles County Waterworks District 40  
John Calandri, Landowners  
Leo Thibault, Public Water Suppliers

Posted: Nov. 8, 2017 @ 9:30am
By:  Patricia Rose                      Interim Secretary

**WATERMASTER ENGINEER**

Phyllis Stanin, Todd Groundwater

*Note: To comply with the Americans with disabilities Act, to participate in any Watermaster meeting please contact Patti Rose at 661-943-3201 at least 48 hours prior to a Watermaster meeting to inform us of your needs and to determine if accommodation is feasible.*

- 1) **Call to Order**
- 2) **Roll Call**
- 3) **Adoption of Agenda**
- 4) **Public comments for non-agenda items.** (This portion of the agenda allows an individual the opportunity to address the Board on any item regarding Watermaster business that is NOT ON THE AGENDA. Without acting or entering a dialogue with the public, Board members may ask clarifying questions about topics posed by the public. Your matter may be referred to the administrator and/or advisory committee.)
- 5) **Consent Agenda**
  - A. Payment of the bills through November 10, 2017
  - B. Approval of the minutes of the special and regular meetings held September 27, 2017.
  - C. Correspondence
- 6) **Advisory Committee Report**
- 7) **Action Items**
  - A. Consideration and possible action to approve Watermaster Attorney Retainer Agreement between the Antelope Valley Watermaster and Craig Parton, Price Postel & Parma LLP.
- 8) **Engineer's Workshop – Phyllis Stanin**
  - A. Issue Papers
    1. Administrative Assessment Section of Rules and Regulations
    2. Pre-Rampdown Production for Non-Overlying Producers and Other Producers
    3. Application of Carry Over Water
    4. New Well Applications by Parties outside of the Judgment

5. Adjudication Boundaries
6. Timing of Annual Report and Monitoring Requirements
7. Process for Implementing Metering Requirements

**9) Staff Report's**

**10) Board Members Request for Future Agenda Items**

**11) Adjournment**

Special Meeting  
November 15, 2017

**Pre-Rampdown Production for  
Non-Overlying Production and Other Producers**



October 18, 2017

**REVISED DRAFT ISSUE PAPER**

**To:** Dennis LaMoreaux, Chair  
Antelope Valley Watermaster Advisory Committee

**From:** Phyllis Stanin, Vice President/Principal Geologist  
Kate White, Senior Engineer  
Watermaster Engineer

**Re:** Pre-Rampdown Production for Non-Overlying Producers and Other Producers

The Judgment does not specify Pre-Rampdown Production for the Non-Overlying Producers (Exhibit 3 of the Judgment) or for the Federal, State, and City of Lancaster Producers, although such production totals have been defined for Overlying Producers (Exhibit 4 of the Judgment). In addition, it does not define Pre-Rampdown Production for other Producers in the Judgment, such as the Non-Stipulating Parties (referred to as the Supporting Landowner Parties in Paragraph VII, a through h, Statement of Decision). The reason(s) that Pre-Rampdown Production for Producers other than the Overlying Producers is absent from the Judgment and has not been researched independently by the Watermaster Engineer; the application of previously-undefined Pre-Rampdown Production to the Judgment will require a legal determination.

A group of Public Water Suppliers<sup>1</sup> has proposed a methodology for developing Pre-Rampdown Production for the Exhibit 3 Producers based on average production for 2011 and 2012, as submitted to the Court during Phase IV of the trial. This methodology was apparently used to define Pre-Rampdown Production for about half of the Overlying Producers in Exhibit 4 of the Judgment.

The purpose of this Issue Paper is to provide information to illustrate how this methodology might be applied to Exhibit 3 Producers or other parties that do not have a defined Pre-Rampdown Production number in the Judgment, if determined to be appropriate. This Issue Paper is not a recommendation for application of the methodology; further, it does not determine that Pre-Rampdown Production in excess of the Production Right is applicable to these parties, recognizing that this requires a legal determination. Rather, the information is provided to facilitate discussion by the Advisory Committee and determination by the Watermaster Board regarding potential assignment of Pre-Rampdown Production for these

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<sup>1</sup> Referred to as the Public Water Suppliers Steering Committee.

Producers. Relevant portions of the Judgment and production data related to this methodology are summarized below.

## RELEVANT PORTIONS OF THE JUDGMENT

Pre-Rampdown Production is defined as *"The reasonable and beneficial use of Groundwater, excluding Imported Water Return Flows, at a time prior to this Judgment, or the Production Right, whichever is greater"* (§3.5.28).

Production Right is defined as *"The amount of Native Safe Yield that may be Produced each Year free of any Replacement Water Assessment and Replacement Obligation. The total of the Production Rights decreed in this Judgment equals the Native Safe Yield..."* (§3.5.32).

Rampdown is defined as *"The period of time for Pre-Rampdown Production to be reduced to the Native Safe Yield in the manner described in this Judgment"* (§3.5.37).

The Judgment describes the rampdown period and process in Paragraph 8.3 as follows:

*...During Years three through seven of the Rampdown Period, the amount that each Party may Produce from the Native Safe Yield will be progressively reduced, as necessary, in equal annual increments, from its Pre-Rampdown Production to its Production Right... (§8.3).*

These definitions may indicate that production reductions during the Rampdown Period apply only to parties that are allocated a portion of the Native Safe Yield<sup>2</sup>, which would include the Producers on Exhibits 3 and 4, as well as State Production Rights. Federal rights are not subject to Rampdown (see below). It is assumed that members of the Small Pumper Class are also not subject to a Pre-Rampdown production amount other than their Production Right, given the small amount of Production Right, the large numbers of Producers, and the details provided in the Judgment regarding their Production Rights (§5.1.3).

Pre-Rampdown Production for each of the Overlying Producers is quantified on Exhibit 4. However, Exhibit 3 does not contain similar information on Pre-Rampdown Production for the Non-Overlying Producers. The Judgment also does not define the Federal or State Pre-Rampdown Production but does state that *"The Federal Reserved Water Right to Produce 7,600 acre-feet per Year is not subject to Rampdown or any reduction including Pro-Rata Reduction due to Overdraft"* (§5.1.4).

For completeness, available information is also summarized herein on other Producers with rights to produce groundwater (but without a Production Right), including the City of Lancaster. For example, the City of Lancaster can produce up to 500 AFY for reasonable and

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<sup>2</sup> Producers allocated a portion of the Native Safe Yield include Overlying Producers (Exhibit 4), Non-Overlying Producers (Exhibit 3), California State Production Right, Federal Production Right, and Small Pumper Class. In addition, the Non-Stipulating parties are also included as having a Production Right.

beneficial uses at its National Soccer Complex until recycled water becomes available (§5.1.7). Consistent with the purpose of this Issue Paper, no recommendation is included as to whether a Pre-Rampdown Production is applicable to these other Producers; again, a legal determination will be required.

Finally, the Statement of Decision identifies eight parties with a right to produce groundwater, which were brought into the Judgment after the Physical Solution (Exhibit A) had been finalized (see Paragraph VII, *a* through *h*, Statement of Decision). Pre-Rampdown Production was not addressed in the Statement of Decision, but the parties were defined as Non-Stipulating Parties, which have a Production Right linked to the Native Safe Yield (§5.1.10).

### **METHODOLOGY FOR ESTABLISHING PRE-RAMPDOWN PRODUCTION FOR THE NON-OVERLYING PRODUCERS**

A group of the Public Water Suppliers has recommended that Pre-Rampdown Production for those Parties listed on Exhibit 3 be defined as the average of their Production in the years 2011 and 2012, as submitted to the Court during Phase IV of the trial (filed July 19, 2013<sup>3</sup>). That document is attached to this memorandum for reference as **Attachment 1**. This methodology was used to define the Pre-Rampdown Production amounts for 47 of the 104 Overlying Producers in Exhibit 4 of the Judgment. The Watermaster Engineer has not researched reasons for applying or not applying the methodology to any particular Exhibit 4 Producer, as this involves a legal determination.

**Table 1** below contains the 2011/2012 average production using production data listed in the July 19, 2013 filing for the Non-Overlying Producers in Exhibit 3. For reference and context, **Table 1** also includes the Production Right and 2016 Production. As suggested by the method, the 2011/2012 average would be used for the Pre-Rampdown Production Right. During Year 3 of the Rampdown Period (2018), this amount would be reduced in equal annual increments in years 3 through 7 of the Rampdown Period to reach the final Production Right.

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<sup>3</sup> Amended Statement of Partial Decision for Phase IV Trial with Party Name Corrections, Antelope Valley Groundwater Cases, Superior Court of the State of California County of Los Angeles – Central District, July 19, 2013.

**Table 1: Non-Overlying Producers 2011/2012 Average Production and Production Rights**

Producer (Exhibit 3 of the Judgment)	Average 2011 and 2012 Production (AF)	Production Rights (AF)	2016 Total Groundwater Production (AF)
Boron Community Services District	230.50	50.00	193.74
California Water Service Company	631.50	343.14	358.10
Desert Lake Community Services District	42.75	73.53	0.00
Littlerock Creek Irrigation District	1,420.19	796.58	1,327.10
Los Angeles County Waterworks District No. 40, Antelope Valley	18,601.12	6,789.26	16,001.90
North Edwards Water District	102.92	49.02	75.57
Palm Ranch Irrigation District	1,230.50	465.69	1,198.00
Palmdale Water District	7,283.76	2,769.63	8,473.40
Quartz Hill Water District	1,479.35	563.73	1,793.60
Rosamond Community Services District	2,990.78	404.42	2,300.00
West Valley County Water District	Not listed in 7/19/13 filing	40.00	129.38

For Desert Lake CSD, the 2011 and 2012 average production amount (42.75 AF-yellow highlighted value in **Table 1**) is less than its Production Right and would not be applicable as a Pre-Rampdown Production Right; as such, its Production Right (73.53 AF) could be used for its Pre-Rampdown Production. Average 2011 and 2012 production for West Valley County Water District was not listed in the Phase IV July 19, 2013 Court filing; accordingly, its Production Right (40 AF – see **Table 1**) could be used for its Pre-Rampdown Production, similar to Desert Lake CSD.

**Table 2** lists the 2011/2012 average production for the Federal, State, and City of Lancaster Producers as contained in the July 19, 2013 filing. The table also provides each Production Right and 2016 Production, when available, for reference. The Federal water right is included in **Table 2** for completeness, but is not subject to Rampdown (§5.1.4 in the Judgment).



**Table 2: Federal<sup>4</sup>, State, and City of Lancaster Production Rights and 2016 Production**

Federal, State and City of Lancaster Rights	Average 2011 and 2012 Production (AF)	Production Rights or Rights to Produce Groundwater	2016 Total Groundwater Production (AF)
Federal Reserved Water Right	Not subject to Rampdown	7,600.00	1,094.01
<b>State of California (207 AF total) from:</b>			
Department of Water Resources	54.05	104.00	Not Reported
Department of Parks and Recreation	1.44	9.00	Not Reported
Department of Transportation	15.56	47.00	Not Reported
State Lands Commission	0.00	3.00	Not Reported
Department of Corrections and Rehabilitation	0.00	3.00	Not Reported
50th District Agricultural Association	0.00	32.00	Not Reported
Department of Veteran Affairs	0.00	3.00	Not Reported
Highway Patrol	0.00	3.00	Not Reported
Department of Military	0.00	3.00	Not Reported
<b>City of Lancaster</b>	506.63	500.00	558.00

The average 2011/2012 production totals for the various State Departments (yellow highlighted values in **Table 2**) are less than the corresponding Production Rights. Therefore, the respective Department Production Right could be designated as the Pre-Rampdown Production. For the City of Lancaster, the 2011/2012 average production could be used as its Pre-Rampdown Production, consistent with the methodology for parties in **Table 1**, if Rampdown applies to the City of Lancaster production.

In summary, Pre-Rampdown Production could be established for Producers in the Judgment, if applicable to Rampdown reductions, using the following criteria:

1. **Average 2011/2012 Production is greater than the Production Right.** The average would be used as the Pre-Rampdown Production amount. From 2018 through 2022, the Pre-Rampdown Production would be reduced in equal increments each year to reach the Production Right.

<sup>4</sup> 2016 production based on final data received 8-10-2017.

2. **Average 2011/2012 is less than or equal to the Production Right.** Pre-Rampdown Production is defined as the Production Right and held constant during the rampdown period (2016-2022).

### NON-STIPULATING PARTIES

Additional Production Rights are assigned to the Non-Stipulating Parties (referred to as the Supporting Landowner Parties in the Statement of Decision, §VII, *a* through *h*). These parties are listed in **Table 3** below, along with each respective Production Right.

**Table 3: Non-Stipulating Parties and Production Rights**

Non-Stipulating Parties	Production Right (AFY)
Desert Breeze MHP, LLC	18.1
Milana VII, LLC dba Rosamond Mobile Home Park	21.7
Reesdale Mutual Water Company	23
Juanita Eyherabide, Eyherabide Land Co., LLC and Eyherabide Sheep Company	12
Clan Keith Real Estate Investments, LLC dba Leisure Lake Mobile Estates	64
White Fence Farms Mutual Water Company No. 3	4
LV Ritter Ranch, LLC	0
Robar Enterprises, Inc., HI-Grade Materials, Co., and CJR, a General Partnership	200

These Parties were determined to be Non-Stipulating Parties in a Trial Stipulation<sup>5</sup>, dated September 28, 2015. These Non-Stipulating Parties were not included in Phase IV of the trial (filed July 19, 2013) and, as such, average production for 2011 and 2012 is not available in that document (**Attachment 1**). In addition, 2016 production for these parties was not reported. However, these production amounts were apparently provided in other Trial Stipulations and could be used for the purposes of Pre-Rampdown Production totals, if warranted. As with other Pre-Rampdown Production totals discussed in this Issue Paper, the applicability of a Pre-Rampdown Production other than the Production Right and the applicable amounts will require a legal determination.

**ATTACHMENT 1:** Amended Statement of Partial Decision for Phase IV Trial with Party Name Corrections, July 19, 2013.

<sup>5</sup> Trial Stipulation for Admission of Evidence by Non-Stipulating Parties and Waiver of Procedural and Legal Objections to Claims by Stipulating Parties Pursuant to Paragraph 5.1.10 of the [Proposed] Judgment and Physical Solution, September 28, 2015.

Special Meeting  
November 15, 2017

Pre-Rampdown Production for  
Non-Overlying Production and Other Producers

Comments

## **ANTELOPE VALLEY WATER MUTUAL GROUP**

Submitted By: John Ukkstad

### **A. Status Update Issue Papers**

#### **b. Pre-Rampdown Production for Non-Overlying Producers and Other Producers**

- Regarding the Non-Stipulating Parties referred to as the Supporting Landowner Parties, we suggest that the Watermaster Engineer and the Board consider whether those pumpers are entitled to any gradual Rampdown at all.
- As stated in the memo, these entities' average 2011-2012 production was not reported in Phase 4 because they did not participate. They also did not provide 2016 data.
- The Statement of Decision states that these Supporting Landowner Parties "will be required to make severe reductions in their current and historical reasonable and beneficial water use under the Trial Stipulations and Physical Solution"
- The Engineer should consider rules and regulations that require the Supporting Landowner Parties to reduce pumping immediately to their designated production rights.

STEPHEN T. CLIFFORD  
ROBERT D. HARDING  
ARNOLD ANCHORDOQUY  
PATRICK J. OSBORN  
MICHAEL L. O'DELL  
GROVER H. WALDON  
JOHN R. SZEWCZYK  
STEPHEN H. BOYLE†  
RICHARD G. ZIMMER  
CHARLES D. MELTON  
T. MARK SMITH  
DANIEL T. CLIFFORD  
† ILM TAXATION

JAMES E. BROWN (RETIRED)

## CLIFFORD • BROWN

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

BANK OF AMERICA BUILDING

1430 TRUXTUN AVENUE, SUITE 900

BAKERSFIELD, CALIFORNIA 93301-5230

TELEPHONE NO. (661) 322-6023 • FACSIMILE NO. (661) 322-3508

WWW.CLIFFORD-BROWNLAW.COM

NICHOLAS J. STREET  
MARC E. DENISON  
WINIFRED THOMSON HOSS  
VICTORIA M. TRICHELL  
ROMAN MACIAS  
JEFFREY P. TRAVIS  
DENNIS P. GALLAGHER, II  
ANN S. GARZA  
DONALD C. OLDAKER  
SENIOR COUNSEL

KATHY R. SMITH  
OFFICE ADMINISTRATOR

ANTHONY L. LEGGIO  
OF COUNSEL

November 1, 2017

2455-2

Advisory Committee  
c/o Dennis D. LaMoreaux  
Palmdale Water District  
2029 E. Avenue Q  
Palmdale, CA 93550

Re: Antelope Valley Groundwater Litigation  
Santa Clara County Superior Court Case No. 1-05-CV-049053  
Judicial Council Coordination Proceeding No. 4408

**BOLTHOUSE'S SUBMISSION TO ADVISORY COMMITTEE  
CONCERNING PURVEYOR CLAIM FOR PRE-RAMPDOWN  
PRODUCTION RIGHT AND CARRYOVER WATER RIGHTS**

### INTRODUCTION

The agreed Judgment and Physical Solution ("Judgment") resulted from trial and negotiations regarding a long-term overdraft of the Antelope Valley groundwater basin. Over a period of roughly 15 years, the parties to the lawsuit litigated necessary issues and continually discussed resolution of the case. Ultimately, over a couple of years of intense negotiations, the parties agreed to the Judgment at issue.

The Judgment documents a bargained for exchange between the parties to resolve the case. Among other things, the landowner parties agreed to cut their production by 50% or more in exchange for concessions set forth in the Judgment. The purveyor parties on the other side of the case, did not agree to cut their groundwater production to the same extent, but made other concessions. The purveyor parties agreed to a fixed production right with no rampdown. The landowners agreed to a fixed production right with a rampdown period to allow them time to adjust to the drastic 50% cuts they agreed to take. The parties did not agree to any pre-rampdown production right for the purveyor parties, or to any purveyor carryover rights not specifically set forth in the Judgment. As part of this bargained for exchange, the purveyor parties received multiple highly contested concessions such as lower cuts in their groundwater production rights, return flow rights,

the right to use the unused portion of the Federal Reserve right and a drought program. The landowners received carryover water rights and storage rights.

**THE PARTIES CANNOT NOW CHANGE THE AGREEMENT IN  
AN ATTEMPT TO OBTAIN RIGHTS AND BENEFITS TO WHICH  
THE PARTIES DID NOT AGREE**

Contracts are made to resolve disputes and to set forth the agreement between the parties. No party is entitled to change the terms of the agreement without agreement of the other parties. Changing the terms to benefit one party would result in a loss of rights by other parties without any corresponding benefit. Legally speaking, this would result in a failure of consideration which would threaten the entire agreement and endanger sustainability of the groundwater basin and the ability of parties to the Judgment to produce groundwater.

**THE CONTRACT IS CLEAR AND UNAMBIGUOUS AND  
CANNOT BE CHANGED WITHOUT AGREEMENT OF THE  
PARTIES TO THE AGREEMENT**

The agreement was hotly contested, discussed, argued and agreed over multiple years. Many bright and talented lawyers negotiated the agreement and reduced the agreement to writing in the Judgment over this multi-year period. The parties now seeking to change the Judgment were involved in both the negotiation and drafting of the Judgment.

All terms of the agreement are set forth in the Judgment. Contracts do not generally include possible terms, even if discussed, which are not ultimately agreed upon. In the same way in this case, contract terms which could have been agreed to, but which were not agreed to, were not included in the Judgment. Simply because a right, for example a pre-production right, a rampdown right or a carryover right is not provided for in the agreed Judgment, does not mean the parties overlooked including these potential rights in the Judgment. To the contrary, it means the parties did not agree to provide such rights.

**BOLTHOUSE'S POSITION REGARDING THE MATTERS AT ISSUE**

1. The parties did not agree that the purveyors would be entitled to any pre-production right and the Judgment clearly does not confer this right.
2. The parties did not agree that the purveyors would be entitled to any carryover rights based upon any supposed pre-production rights because no

such rights were agreed and the Judgment clearly does not confer such rights.


3. The parties agreed the purveyors could use the unused portion of the Federal Reserve right, but did not agree the purveyors would have any carryover rights related to such water and the Judgment clearly does not confer such rights.

### **CONCLUSION**

The Judgment must be applied as set forth therein and as approved by the Court. Failure to follow the Judgment as agreed and approved by the Court will endanger the sustainability of the groundwater basin and the ability of the parties to exercise their rights under the Judgment.

The Judgment clearly set forth the agreement of the parties. The Judgment does not set forth what could have been agreed to, but which was not agreed to. The parties are not entitled to change the agreement years later suggesting that additional rights, which are clearly not provided for in the Judgment, should be inferred or implied.

Very truly yours,



RICHARD G. ZIMMER

RGZ/ds

BL/ANTELOPE VALLEY/WATERMASTER/ADVISORY COM 01



400 Capitol Mall, 27th Floor  
Sacramento, CA 95814

T | 916.321.4500  
F | 916.321.4555

Stanley C. Powell

## MEMORANDUM

### ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY WORK PRODUCT

TO: Dennis LaMoreaux  
Chairperson  
Antelope Valley Watermaster Advisory Committee  
E-Mail: dlamoreaux@palmdalewater.org

FROM: Stanley C. Powell

DATE: November 1, 2017

RE: Comments on Pre-Rampdown Production

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I represent the City of Los Angeles in the Antelope Valley Groundwater Cases and serve as the "Public Landowner" member of the Advisory Committee called for in Section 19.1 of the Judgment. This memorandum presents comments on Pre-Rampdown Production, offered in my role as a member of the Advisory Committee. The City of Los Angeles, and any other Advisory Committee members that choose to join in these comments, reserves the right to further participate in the evaluation and consideration of Pre-Rampdown Production provisions of the Judgment as this process continues.

### INTRODUCTION

The Watermaster is preparing to consider a proposal by the Public Water Suppliers' "Steering Committee"<sup>1</sup> ("Steering Committee") to add Pre-Rampdown Production values to the Judgment for Parties listed on Exhibit 3 of the Judgment, using a specific methodology recommended by the Steering Committee. The Watermaster Engineer's October 18, 2017 Revised Draft Issue

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<sup>1</sup> The 2016 Annual Report describes the Steering Committee as "an informal gathering of Public Water Suppliers to discuss Watermaster Issues" whose "meetings are not open to the public" (2016 Annual Report, Appendix C-1). Appendix C-1 lists specific members of the Steering Committee for some Public Water Suppliers, but does not list members for Boron Community Services District, West Valley County Water District, or North Edwards Water District, and it is not clear whether those Parties are members of the "Steering Committee." It is also not clear what it means to have the Steering Committee make a recommendation to the Watermaster (is it a recommendation by all members? Is it a recommendation by a majority of the members? Is it a recommendation based on some manner of weighted vote by the members?).



Paper "Pre-Rampdown Production for Non-Overlying Producers and Other Producers" ("Pre-Rampdown Issue Paper") was discussed by the Advisory Committee, though the only written documentation I am aware of is this Issue Paper. The Issue Paper is limited in scope, primarily directed to providing "information to illustrate how this methodology might be applied to Exhibit 3 Producers or other parties that do not have a defined Pre-Rampdown Production number in the Judgment, if determined to be appropriate." Important limitations identified in the Pre-Rampdown Issue Paper include:

- "This Issue Paper is not a recommendation for application of the methodology;"
- "It does not determine that Pre-Rampdown Production in excess of the Production Right is applicable to these parties, recognizing that this requires a legal determination."

The Advisory Committee has invited its members to individually provide comments on Pre-Rampdown Production for internal consideration by the Advisory Committee to attempt to consolidate comments, and then to be forwarded to the Watermaster for consideration in its deliberations. The submittal of competing views of this issue is consistent with the operating principles for the Advisory Committee.

Comments in this memorandum address a number of issues not considered in the Pre-Rampdown Issue Paper, but which will be critical for the Watermaster to consider in its deliberations. The key issues include:

- Are Pre-Rampdown Production values necessary to implement the Judgment as written?
- Is there a reasonable interpretation of the Judgment as written that justifies adding Pre-Rampdown Production values for Parties who do not have such values in the Judgment?
- Is the methodology proposed by the Steering Committee to add Pre-Rampdown Production values consistent with the Judgment?

These issues are discussed in the sections that follow.

There is an additional broad issue which, while not addressed in this memorandum, should be considered by the Watermaster in its deliberations. In order to fulfill its duty to implement the Judgment, the Watermaster will need to make reasonable interpretations of the Judgment. However, the Watermaster's duties do not extend to amending the Judgment. The Watermaster should evaluate whether its actions with respect to Pre-Rampdown Production fall inside of its powers and duties defined in Section 18.4 of the Judgment (i.e., interpreting the Judgment), or outside of that Section (i.e., amending the Judgment). For example, adding quantified Pre-Rampdown Production values for Parties without such values in the Judgment would appear to be an amendment to the Judgment and not an interpretation.



## SUMMARY

- The Judgment can be implemented as written by assuming that the Pre-Rampdown Production value is equal to the Production Right if no other value is specified in the Judgment as written.
- While the Watermaster Engineer's Issue Paper evaluates the Pre-Rampdown Production values that would be established for Exhibit 3 Parties using the methodology proposed by the Steering Committee, the Issue Paper does not evaluate the basis for determining Pre-Rampdown Production values not provided in the Judgment, and does not fully evaluate whether the proposed methodology is consistent with the Judgment.
- The methodology proposed by the Steering Committee has been documented in the Watermaster Engineer's Issue Paper. However, the Watermaster Engineer does not evaluate the justification for interpreting the Judgment as requiring establishment of Pre-Rampdown Production, and I am not aware that the Steering Committee has documented their proposal in writing.
- In the absence of a stated basis to establish Pre-Rampdown Production values, it is not possible to evaluate with precision whether use of the proposed methodology is appropriate. However, it is possible to identify some issues that should be considered by the Watermaster in evaluating the proposal:
  - One factor to evaluate is if the intent of the Judgment was to provide Pre-Rampdown Production values to Parties that don't have such values in the Judgment as written, why was the lack of such values not raised until more than a year after the entry of the Judgment.
  - The Statement of Decision indicates that the lack of Pre-Rampdown Production values for Non-Overlying Parties may be part of a negotiated outcome where those same Parties were granted rights to Produce Groundwater based on the portion of the Federal Reserved Water Rights not used by the United States.
  - The lack of Pre-Rampdown Production values for Parties in the Judgment may reflect other negotiated trade-offs that are not documented in the Statement of Decision.
  - The Steering Committee's proposed methodology is problematic in that it does not reproduce all of the Pre-Rampdown Production values defined in Exhibit 4 of the Judgment.
  - The proposal will result in increased overdraft in the Basin that is not offset by the purchase of Replacement Water;
  - The extent of additional Pre-Rampdown Production values that might be required based on the proposal may be much larger than that indicated in the Watermaster Engineer's Pre-Rampdown Issue Paper.



- The specific methodology proposed by the Steering Committee to determine Pre-Rampdown Production values is inconsistent with Section 3.5.28 of the Judgment, in that it systematically overestimates Pre-Rampdown Production values for Exhibit 3 Parties by failing to reduce those values to reflect that a portion of their Production may be based on Imported Water Return Flows.

#### **ARE PRE-RAMPDOWN PRODUCTION VALUES FOR ALL PARTIES NECESSARY TO IMPLEMENT THE JUDGMENT AS WRITTEN?**

The starting point in interpreting the Judgment is to consider the actual language of the Judgment. The significance of Pre-Rampdown Production values is that it provides a basis for reduction of the Replacement Water Assessments during the Rampdown Period, pursuant to Section 8.3 of the Judgment, which states in part that:

During Years three through seven of the Rampdown Period, the amount that each Party may Produce from the Native Safe Yield will be progressively reduced as necessary, in equal annual increments, from its Pre-Rampdown Production to its Production Right.

Pre-Rampdown Production is defined in Section 3.5.28 of the Judgment as:

The reasonable and beneficial use of Groundwater, excluding Imported Water Return Flows, at a time prior to the Judgment, or the Production Right, whichever is greater.

Exhibit 4 of the Judgment presents Pre-Rampdown Production values for Parties with Overlying Rights. No other Pre-Rampdown Production values are provided in the Judgment.

The threshold question for Pre-Rampdown Production is whether Pre-Rampdown Production values should be defined for Parties that do not have such values in the Judgment as written. The lack of Pre-Rampdown Production values for Parties reflects the outcome of the negotiations among the Parties. If no specific value of Pre-Rampdown Production is provided for a Party, then the Pre-Rampdown Production value should be assumed to be equal to the Production Right as the default (consistent with Section 3.5.28 of the Judgment). Under this interpretation, Parties without a Pre-Rampdown Production value in the Judgment could pump any amount during the first two years of the Rampdown Period without paying a Replacement Water Assessment, and would be liable for Replacement Water Assessments for Production that exceeds their Production Right for years three through seven of the Rampdown Period.

#### **IS THERE A REASONABLE INTERPRETATION OF THE JUDGMENT THAT JUSTIFIES ADDING PRE-RAMPDOWN PRODUCTION VALUES NOT SPECIFIED BY THE JUDGMENT**

As discussed in the Watermaster Engineer's Issue Paper, the Steering Committee "has proposed a methodology for developing Pre-Rampdown Production for the Exhibit 3 Producers." The Issue Paper does not provide an explanation of the basis for adding Pre-Rampdown Production values for Exhibit 3 Producers:



The reason(s) that Pre-Rampdown Production for Producers other than the Overlying Producers is absent from the Judgment and has not been researched independently by the Watermaster Engineer; the application of previously-undefined Pre-Rampdown Production to the Judgment will require a legal determination.

The absence of any documented Judgment interpretation that justifies adding Pre-Rampdown Production values for Parties that do not have such values in the Judgment makes it difficult to comment on the proposal. For the purpose of providing comments, we must assume that the following two statements describe the rationale for the Steering Committee's proposed methodology:

- An interpretation that Section 8.3 of the Judgment requires Pre-Rampdown Production values for all Producers; and
- The definition of Pre-Rampdown Production in Section 3.5.28 of Judgment provides sufficient direction on appropriate methodology to establish Pre-Rampdown Production values.

There are number of concerns with this approach, which include the following:

**The Physical Solution in the Judgment was Negotiated, and Evidence is Needed to Show Intent to Provide Pre-Rampdown Production Values to All Parties**

The Judgment was negotiated among the stipulating parties, and evaluated by the Court before the Court adopted it as its own. Pre-Rampdown Production values can result in significant reductions in Replacement Water Assessments during the Rampdown Period, and no explanation is provided as to why such values were not determined through the negotiations that led to the Judgment if the intent was for all Parties to have quantified Pre-Rampdown Production values. Similarly, no explanation is provided for why concerns about the lack of such values was not raised before the entry of the Judgment. We did not become aware of this issue until it was raised by the Watermaster Engineer in the summer of 2017 during the development of the 2016 Annual Report (more than a year after entry of the Judgment).

**The Statement of Decision Indicates that Parties on Exhibit 3 Had Already Cut Back Water Use at Time of Judgment, and The Lack of Pre Rampdown Production Values Appears To Be a Trade-off for Access to Unused Federal Reserved Water Rights**

Section XII.G.1 of the Statement of Decision (page 23, lines 8-10) provides that:

When the United States does not take its allocation, the Physical Solution provides for certain parties who have cut back their present water use to use that water consistent with the Constitutional mandate of Article X, Section 2 to put the water to its fullest use.

(underling added). The "certain parties" being referenced are those Non-Overlying Production Rights holders that are allocated the portion of the Federal Reserved Water Right that is not



used by the United States, as discussed in Section 5.1.4.1 of the Judgment. This language from the Statement of Decision is significant for at least a couple reasons:

- It shows that Non-Overlying Parties on Exhibit 3 had already "cut back their present water use," so that they may not need the transition to operation within their Production Right during the Rampdown Period; and
- It is consistent with the idea that the lack of Pre-Rampdown Production values for Non-Overlying Parties on Exhibit 3 reflects the outcome of a negotiation, where the lack of Pre-Rampdown Production values for those Parties may have provided the basis for the allocation of the unused portion of the Federal Reserved Water Right to them.

### **Selective Interpretations of a Judgment based on Negotiation among Parties Can Destroy the Negotiated Balance Among the Parties**

As discussed above, it appears the lack of Pre-Rampdown Production values for the Non-Overlying Parties on Exhibit 3 may have been negotiated in return for the ability of those Parties to Produce on the basis of the unused portion of the Federal Reserved Water Right. This is one example of how a "creative" interpretation of a negotiated Judgment after the fact disturbs the equity agreed to among the Parties during the negotiation – the methodology proposed by the Steering Committee seems to have the effect of allowing the Non-Overlying Parties on Exhibit 3 to "reclaim" the benefits of a Pre-Rampdown Production value that was negotiated away, while retaining the access to the Federal Reserved Water Rights that was obtained in exchange.

It should be noted that for this example, the Statement of Decision happens to provide some evidence of one particular trade-off which may have been negotiated. There may be other trade-offs which are difficult to reconstruct at this late date, and which are not clearly identified in the Statement of Decision.

### **The Interpretation to Justify the Proposed Methodology May Depend on the Idea that Section 3.5.28 of the Judgment Provides Sufficient Direction to Determine Pre-Rampdown Production Values that are Consistent with Those Already Quantified in Exhibit 4**

The determination of Pre-Rampdown Production values after entry of the Judgment would likely require confidence that Pre-Rampdown Production values to be established after entry of the Judgment would be consistent with those already quantified in Exhibit 4.<sup>2</sup> However, the Pre-Rampdown Issue Paper documents that the methodology proposed by the Steering Committee

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<sup>2</sup> It may be that the Steering Committee does have an interpretation where consistency of Pre-Rampdown Production values to be established by their proposed Methodology does not need to be consistent with the existing values in Exhibit 4. However, I believe it will be extremely difficult to make a credible argument that Exhibit 4 Parties would have accepted a Judgment that set their values in the Judgment as entered, while accepting that others could establish values at a later date in ways that are inconsistent with the values in Exhibit 4.



only replicates Pre-Rampdown Production values for about half of the Exhibit 4 Parties.<sup>3</sup> This lack of consistency is problematic in the justification to add Pre-Rampdown Production after entry of the Judgment.

### **Adding Pre Rampdown Production Values to the Judgment Is Inconsistent with the Objective of Avoiding Overdraft in the Basin**

The primary objective of the Judgment is to provide a "physical solution to the Basin's chronic overdraft conditions" (Statement of Decision at page 2, lines 4 through 7). The Physical Solution contained in the Judgment provides that "if existing groundwater users exceed their respective allocations, they will pay a replacement assessment that will be used to bring additional imported water into the Basin" (Statement of Decision at page 22, lines 5 through 7). Adding Pre-Rampdown Production values for the Exhibit 3 Parties will result in additional overdraft in the basin that will not be mitigated by the purchase of an offsetting amount of Replacement Water.<sup>4</sup> In its review of the physical solution, the Court made certain findings which are contained in the Statement of Decision. The Court may need to make new findings based on a material change in the amount of overdraft in the Basin which may occur with the lesser amount of Replacement Water that would be purchased during the Rampdown Period.

### **The Scope of the Proposed Methodology May Be Greater than that Implied in the Pre-Rampdown Issue Paper**

The assumption we have made as to the basis for adding Pre-Rampdown Production values could apply to a number of Parties, and may not be limited to Non-Overlying Parties. The Pre-Rampdown Issue Paper provides some suggestions about the scope, but not in definitive language, including that: (1) Section 8.3 "may indicate" that Pre-Rampdown Production values might only be needed for Parties with Production Rights – but an argument might be made that it could apply to those with other rights to Produce Groundwater that are not Production Rights; (2) Members of the Small Pumper Class are "assumed" to not be "subject to a Pre-Rampdown production amount other than their Production Right" – again, an argument could probably be made that they would be entitled to Pre-Rampdown Production values under the proposed methodology; (3) a "legal determination will be required" to determine if Parties with rights to Produce Groundwater, but not Production Rights, should have Pre-Rampdown Production values defined for them; (4) "the application of a Pre-Rampdown Production other than the Production Right and the applicable amounts will require a legal determination" for Non-

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<sup>3</sup> The specific statement in the Pre-Rampdown Issue Paper is: "This methodology was apparently used to define Pre-Rampdown Production for about half of the Overlying Producers in Exhibit 4 of the Judgment" (page 1). As will be discussed later in this memorandum, the consistency between some of the Pre-Rampdown Production values on Exhibit 4 and values computed based on the proposed methodology is not necessarily an indication that the same methodology was used.

<sup>4</sup> The Watermaster Engineer has also prepared in Issue Paper to consider whether the amounts of Pre-Rampdown Production that are greater than the Production Right can be Carried Over. If they can be Carried Over, that would increase the probability that Production that is in excess of the Production Right will eventually occur, without the offsetting purchase of Replacement Water.



Stipulating Parties that were granted Production Rights by the Court. Neither the definition of Pre-Rampdown Production in Section 3.5.28 nor the discussion of the use of the Pre-Rampdown Production value in Section 8.3 provide a clear basis to exclude these other types of Producers.

**IS THE METHODOLOGY PROPOSED BY THE STEERING COMMITTEE TO ADD PRE-RAMPDOWN PRODUCTION VALUES CONSISTENT WITH THE JUDGMENT?**

The methodology proposed by the Public Water Suppliers' Steering Committee is not appropriate, because it is inconsistent with the Judgment. Section 3.5.28 defines Pre-Rampdown Production as follows (italics added):

The reasonable and beneficial use of Groundwater, *excluding Imported Water Return Flows*, at a time prior to this Judgment, or the Production Right, whichever is greater.

The Steering Committee's proposed methodology would determine Pre-Rampdown Production based on average Production for 2011 and 2012, without any consideration of what the Imported Water Return Flows might be. This is particularly significant in the evaluation of possible Pre-Rampdown Production values for the Public Water Suppliers, because most of those Parties have rights to Imported Water Return Flows on Exhibit 8 of the Judgment, and in aggregate they probably use the great majority of the imported water in the Antelope Valley.

The methodology recommended by the Steering Committee would systematically overstate Pre-Rampdown Production values for Exhibit 3 Parties, because it fails to reduce that value to reflect Imported Water Return Flows. This may in part explain the disparity in the amount of Pre-Rampdown Production as a percent of the total Production Rights for the Exhibit 4 parties versus the Exhibit 3 parties (as estimated in the Issue Paper).

	Pre-Rampdown Production (AF)	Production Right (AF)	Pre-Rampdown Production as Percent of Production Right
Exhibit 4	105,878.08	58,322.23	182%
Exhibit 3	34,084.15	12,345.00	276%

Because the methodology proposed by the Steering Committee does not consider Imported Water Return Flows, it is not clear that the proposed methodology "was apparently used to define Pre-Rampdown Production for about half of the Overlying Producers in Exhibit 4 of the Judgment," as asserted on page 1 of the Watermaster Engineer's Pre-Rampdown Issue Paper. Most Parties on Exhibit 4 do not have rights to Produce Imported Water Return Flows, so that the lack of consideration of Imported Water Return Flows would not tend to impact their Pre-Rampdown Production value, even though the methodology proposed is incomplete (in other words, Pre-Rampdown Production values in Exhibit 4 that match values that would result from application of the methodology proposed by the Public Water Suppliers' Steering Committee is



Dennis LaMoreaux  
November 1, 2017  
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not evidence that the methodology used to determine Pre-Rampdown Production values in Exhibit 4 was the same as that being proposed by the Public Water Suppliers' Steering Committee).





Special Meeting  
November 15, 2017

## Application of Carry Over Water



October 18, 2017

## REVISED DRAFT ISSUE PAPER

**To:** Dennis LaMoreaux, Chair  
Antelope Valley Watermaster Advisory Committee

**From:** Phyllis Stanin, Vice President/Principal Geologist  
Kate White, Senior Engineer  
Todd Groundwater, Watermaster Engineer

**Re:** Application of Carry Over Water

This Draft Issue Paper discusses the application of Carry Over Water as defined in the Judgment. The primary purpose of the Issue Paper is to provide information on the details of Carry Over Water, as interpreted from the Judgment, to ensure proper water accounting by the Watermaster Engineer. Once the proper determination is clear, the information in the Issue Paper will be revised and expanded for inclusion in the Antelope Valley Watermaster Rules and Regulations.

The Rules and Regulations are meant to develop processes and procedures to implement the Judgment rather than simply repeat portions of the Judgment. However, for the purposes of this Issue Paper, relevant sections and definitions from the Judgment are included for context and to facilitate proper determination of Carry Over Water eligibility. Paragraphs from the Judgment (¶) are referenced where applicable.

This Draft Issue Paper is being presented to the Advisory Committee to facilitate discussion on the Carry Over Water issues. After considering comments from the Advisory Committee and others, a revised Issue Paper will be presented to the Watermaster Board for additional comments and direction.

We recognize that a legal determination may be necessary for some of the details provided herein. Our goal is to provide a starting point for comments and further analysis by others to achieve a collective understanding of how specific portions of the Judgment will be implemented.

## 1. KEY DEFINITIONS

The Judgment defines Carry Over Water as “the right to Produce an unproduced portion of an annual Production Right or a Right to Imported Water Return Flows in a Year subsequent to the Year in which the Production Right or Right to Imported Water Return Flows was originally available.” (¶3.5.9). This definition suggests that there are only two sources of Carry Over Water – the Production Right and Imported Water Return Flows.

The Judgment defines Production Right as follows: “The amount of the Native Safe Yield that may be Produced each Year free of any Replacement Water Assessment and Replacement Obligation. *The total of the Production Rights decreed in this Judgment equals the Native Safe Yield.* A Production Right does not include any right to Imported Water Return Flows pursuant to Paragraph 5.2.” (¶3.5.32, emphasis added).

Note that *Production Right* is explicitly tied to the allocation of Native Safe Yield, which is determined to be 82,300 AFY (¶4.1). The rights to produce groundwater that add up to this Native Safe Yield<sup>1</sup> are the only rights that are a *Production Right*, by definition. Collectively, these definitions indicate that parties without a Production Right as determined by the Judgment, would not be eligible for Carry Over Water.

Further, these definitions indicate that Carry Over would not apply to the Pre-Rampdown Production amount, if higher than the Production Right. The Judgment also limits the number of parties eligible for Carry Over Water to three Producer classes with Production Rights as explained below. Specifics on conditions and producers eligible for Carry Over are discussed in the following sections.

## 2. CONDITIONS AND PRODUCERS ELIGIBLE FOR CARRY OVER AS SPECIFIED IN THE JUDGMENT

Section 15 of the Judgment provides three eligible conditions under which Carry Over Water is entitled, including *In Lieu Production Right Carry Over* (¶15.1), *Imported Water Return Flow Carry Over* (¶15.2), and *Production Right Carry Over* (¶15.3). Further, the Judgment specifies that only three Producer classes are eligible for Carry Over Water: Overlying Producers (¶5.1.1 – Exhibit 4 of the Judgment), State of California Water Right (¶5.1.5), and Non-Overlying Producers (¶5.1.6 – Exhibit 3 of the Judgment). Relevant text from Section 15 of the Judgment is summarized below<sup>2</sup>.

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<sup>1</sup> Production Rights under the Judgment are: Overlying Production Rights (58,322 AFY), Non-Overlying Production Rights (12,345 AFY), Federal Reserved Water Right (7,600 AFY), Small Pumper Class Rights (3,806 AFY), and the California Production Right (207 AFY), the sum of which was rounded to 82,300 AFY.

<sup>2</sup> Please refer to Section 15 of the Judgment for full text on Carry Over.

**2-1. In Lieu Production Right Carry Over (¶15.1)**

“Any Producer identified in Paragraph 5.1.1, 5.1.5, and 5.1.6 can utilize In Lieu Production by purchasing imported Water and foregoing Production of a corresponding amount of the annual Production of Native Safe Yield provided for in paragraph 5 herein. In Lieu Production must result in a net reduction of annual Production from the Native Safe Yield in order to be entitled to the corresponding Carry Over benefits under this paragraph. In Lieu Production does not make additional water from the Native Safe Yield available to any other Producer.”

Additional conditions applicable to this type and other types of Carry Over Water are provided in Section 2-4 of this Issue Paper.

**2-2. Imported Water Return Flow Carry Over (¶15.2)**

“If a Producer identified in paragraph 5.1.1, 5.1.5, and 5.1.6 fails to produce its full amount of Imported Water Return Flows in the Year following the Year in which the Imported Water was brought into the Basin, the Producer may Carry Over its right to the unproduced portion of its Imported Water Return Flows for up to ten (10) years.”

Additional conditions applicable to this type and other types of Carry Over Water are provided in Section 2-4 of this Issue Paper.

**2-3. Production Right Carry Over (¶15.1)**

“If a Producer identified in paragraph 5.1.1, 5.1.5, and 5.1.6 fails to Produce its full Production Right in any Year, the Producer may Carry Over its right to the unproduced portion of its Production Right for up to ten (10) Years.”

Additional conditions applicable to this type and other types of Carry Over Water are provided in Section 2-4 of this Issue Paper.

**2-4. Conditions Applying to All Carry Over Water (¶15.1, ¶15.2, and ¶15.3)**

For each of the three types of Carry Over Water summarized above, the following conditions apply:

- The Producer may Carry Over its right to the unproduced portion of its Production Right or Imported Water Return Flows for up to ten (10) Years.
- A Producer must Produce its full current year’s Production Right before any Carry Over Water, or any other water, is Produced. Carry Over Water will be produced on a first-in, first-out basis.
- At the end of the Carry Over period, the Producer may enter into a Storage Agreement with the Watermaster to store unproduced portions, subject to terms and conditions in the Watermaster’s discretion.

- Any such Storage Agreements shall expressly preclude operations, including the rate and amount of extraction, which will cause a Material Injury to another Producer or party, any subarea or the Basin.
- If not converted to a Storage Agreement, Carry Over Water not Produced by the end of the tenth Year reverts to the benefit of the Basin and the Producer no longer has a right to the Carry Over Water.
- The Producer may transfer any Carry Over Water or Carry Over Water stored pursuant to a Storage Agreement.

Additional details regarding transferred Carry Over Water will be developed for the Transfer section of the Rules and Regulations. However, it is assumed that the 10-year time frame associated with the Carry Over Water begins when the water is first designated as Carry Over Water and does not change due to a transfer. For example, if a Carry Over account is transferred in Year 9, it remains Year-9 Carry Over in the recipient's account.

The requirement to use Carry Over Water on a first-in, first-out basis will also apply to the transfer. Accordingly, the recipient of transferred Carry Over Water will need to compare the initial time that the transferred water was first designated as Carry Over Water with the initial time of other Carry Over designations that the recipient may already have in its account.

### 3. PARTIES NOT ELIGIBLE FOR CARRY OVER WATER

As discussed above, Section 15 specifies the three classes of Production Rights that are eligible for the three conditions of Carry Over Water in the Judgment. This indicates that other classes of Production Rights including the Small Pumper Class and the Federal Water Right are not eligible for Carry Over. It follows that if the Federal Water right is not eligible for Carry Over, then any unused portion of that right assigned to other parties is also not eligible for Carry Over.

In addition, the Non-Stipulating Parties are specifically excluded from Carry Over Water, even though the Judgment indicates that these producers have a Production Right<sup>3</sup> (§15.1.10). Collectively, the information in the Judgment – including the definition of Production Right and the exclusion of others in Section 15 – also indicates that Producers without a Production Right, but with a right to produce groundwater under

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<sup>3</sup> According to information provided by attorneys for Clan Keith/Leisure Lake, the Supporting Landowner Parties are included in the Non-Stipulating Parties, with a Production Right described in the Judgment (§15.1.10). According to Paragraph 5.1.10, the Non-Stipulating Parties “shall not be entitled to benefits provided by Stipulation, including but not limited to Carry Over pursuant to Paragraph 15...”

the Judgment, are not eligible for Carry Over Water, unless obtained through a transfer<sup>4</sup>.

Using the information above as criteria, a partial list of those parties not eligible for Carry Over Water would include:

- City of Lancaster
- Antelope Valley Joint Union High School District (regarding the right to produce up to 29 AFY over its Exhibit 4 Production Right)
- Phelan Pinon Hills CSD
- Non-Stipulating Parties (referred to as the Supporting Landowner Parties in the Statement of Decision, §VII, *a* through *h*)
- Federal Reserved Right (including unused rights assigned to others)
- Small Pumpers Class
- Members of the Non-Pumper Class.

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<sup>4</sup> All transfers are subject to hydrologic review by the Watermaster Engineer (§16.1). All transfers are also pursuant to Section 16 and other requirements or limitations in the Judgment – for example, see the limitations on Carry Over Water transfers by the Antelope Valley United Mutuals Group (§16.3). Additional details regarding transfers will be developed for the Rules and Regulations document.

Special Meeting  
November 15, 2017

## Application of Carry Over Water

### Comments



400 Capitol Mall, 27th Floor  
Sacramento, CA 95814

T | 916.321.4500  
F | 916.321.4555

**Stanley C. Powell**  
spowell@kmtg.com

## MEMORANDUM

### VIA ELECTRONIC MAIL ONLY

TO: Dennis LaMoreaux  
Chairperson  
Antelope Valley Watermaster Advisory Committee  
E-Mail: dlamoreaux@palmdalewater.org

FROM: Stanley C. Powell

DATE: November 1, 2017

RE: Comments on Clarification of Carry Over Rules

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I represent the City of Los Angeles in the Antelope Valley Groundwater Cases, and am presently serving as the "Public Landowner" member of the Advisory Committee discussed in Section 19.1 of the Judgment. This memorandum presents comments on Carry Over offered in my role as a member of the Advisory Committee. As noted in the Watermaster's October 18, 2017 "Revised Draft Issue Paper on Application of Carry Over Water" ("Carry Over Issue Paper"), "a legal determination may be necessary for some of the details" with respect to Carry Over. The City of Los Angeles (and any other Advisory Committee members that choose to join in these comments) reserves the right to further participate in the evaluation and consideration of Carry Over provisions of the Judgment as this process continues.

### INTRODUCTION

The Watermaster is preparing to consider the development of Rules and Regulations for Carry Over water under the Judgment. Carry Over provisions in the Judgment have been discussed by the Advisory Committee, and several areas of controversy were identified between committee members (and between attendees to the meetings who voiced their views). The Advisory Committee has invited its members to individually provide comments on Carry Over for internal consideration by the Advisory Committee to attempt to consolidate comments, and then to be forwarded to the Watermaster for consideration in its deliberations. The submittal of competing views on this issue is consistent with the operating principles for the Advisory Committee.

We have reviewed the Carry Over Issue Paper and are generally in agreement with its analysis and conclusions. This memorandum primarily focuses on providing the Watermaster with comments on the two areas of disagreement among the Advisory Committee members:



- Whether non-production of Groundwater during years three through seven of the Rampdown Period that is not subject to the Replacement Water Assessment but which exceeds a Party's Production Right provides a basis to generate Carry Over; and
- Whether the non-use by certain Public Water Suppliers of the portion of the Federal Reserved Water Right that was not used by the United States in the prior year provides a basis to generate Carry Over.

There is an additional broad issue which, while not addressed in this memorandum, should be considered by the Watermaster in its deliberations. In order to fulfill its duty to implement the Judgment, the Watermaster will need to make reasonable interpretations of the Judgment. However, the Watermaster's duties do not extend to amending the Judgment. The Watermaster should evaluate whether its actions with respect to Carry Over rules and regulations fall inside of its powers and duties defined in Section 18.4 of the Judgment (i.e., interpreting the Judgment), or outside of that Section (i.e., amending the Judgment). For example, allowing Carry Over to be generated in ways that are inconsistent with the very definition of Carry Over in the Judgment would appear to be an amendment to the Judgment and not an interpretation.

A summary of the comments is provided first, followed by sections that discuss the interpretation of the plain language of the Judgment on Carry Over, and issues to be considered if Carry Over will be evaluated based on an alternate interpretation to that provided by the Watermaster Engineer.

## SUMMARY

- The Watermaster Engineer's Issue Paper evaluates the plain language of the Judgment with respect to Carry Over and reaches the following conclusions (with which we agree):
  - Carry Over can only be generated by non-use of either: (1) Production Rights; or (2) Rights to Produce Imported Water Return Flows.
  - Carry Over cannot be generated by non-use of amounts that can be Produced during the Rampdown Period that are not subject to the Replacement Water Assessment and which exceed the Production Rights or Rights to Produce Imported Water Return Flows.
  - Carry Over cannot be generated by non-use of the portion of the Federal Reserved Water Right not used by the United States in the prior year, because the Federal Reserved Water Right cannot be used to generate Carry Over in the first instance.
- Under the Judgment, all Producers share in funding the Administrative Budget through the levy of the Administrative Assessment on all Production of Groundwater in the Basin. For Production Rights and Rights to Produce Imported Water Return Flows, Administrative Assessments are levied on the basis of the right (rather than on the basis of actual Production), because the portion of those rights that are not Produced in the year they accrue will Carry Over and be available to Produce in later years without being subject to the Administrative Assessment. Carry Over should not be generated if no



Administrative Assessment is paid on the amount of Carry Over generated, including both: (1) the ability during the Rampdown Period to Produce Groundwater in excess of a Party's Production Right or Imported Water Return Flow right that is not subject to the Replacement Water Assessment; and (2) use of the portion of the Federal Reserved Water Right that is not used by the United States.

- Expanding Carry Over beyond that allowed by the plain language of the Judgment results in greater overdraft that is not offset by the purchase of Replacement Water, which is inconsistent with the objective of the Judgment.
- While most discussion about Carry Over of Pre-Rampdown Production amounts if higher than the Production Right has looked at years three through seven of the Rampdown Period, the basis to compute Carry Over needs to also apply to years one and two of the Rampdown Period.
- The treatment of Carry Over in the agreement between AVEK and Waterworks District No. 40 may provide insight into how Carry Over should be credited where a Party other than the holder of the Production Right is Producing Water under the Right. In this lease agreement, it is anticipated that the holder of the Production Right (AVEK) is credited with the Carry Over by the Watermaster, rather than the Party that has leased the right (Waterworks District No. 40). By analogy, this suggests that the Non-Overlying Parties that Produce Groundwater based on an allocated share of the portion of the Federal Reserved Water Right not used by the United States should not be credited with Carry Over by the Watermaster based on that allocated share.

#### **INTERPRETATION OF PLAIN LANGUAGE OF JUDGMENT**

The Carry Over Issue Paper presents an interpretation based on the plain language of the Judgment. A key principle for Carry Over discerned from the language of the Judgment is "that there are only two sources of Carry Over Water – the Production Right and Imported Water Return Flows" (Carry Over Issue Paper, page 2), based on the definition of Carry Over Water in Section 3.5.9 of the Judgment. The Carry Over Issue Paper notes that "Carry Over would not apply to the Pre-Rampdown Production amount, if higher than the Production Right" as that would be inconsistent with the definition of Carry Over Water (Carry Over Issue Paper, page 2).

The Carry Over Issue Paper also notes that Sections 15.1, 15.2, and 15.3 of the Judgment identify "three classes of Production Rights that are eligible for the three conditions of Carry Over Water in the Judgment" (Carry Over Issue Paper, page 4, which identifies these three classes as Overlying Production Rights, the State of California Production Rights, and the Non-Overlying Production Rights). The Federal Reserved Water Right is not included as a class of Production Right that is eligible for Carry Over. Based on that analysis, the Watermaster Engineer indicates that the Federal Reserved Water Right is not eligible for Carry Over.

In addition to the analysis of the Watermaster Engineer summarized above, the treatment of Administrative Assessments in the Judgment also indicates that neither Pre-Rampdown Production amounts in excess of a Production Right nor Federal Reserved Water Rights are eligible for Carry Over. Section 9.1 of the Judgment provides in part that:



Administrative Assessments to fund the Administrative Budget adopted by the Watermaster shall be levied uniformly on an annual basis against (1) each acre-foot of a Party's Production Right as described in Paragraph 5.1, (2) each acre-foot of a Party's right to Produce Imported Water Return Flows as determined pursuant to Paragraph 5.2, (3) each acre-foot of a Party's Production for which a Replacement Water Assessment has been imposed pursuant to Paragraph 9.2, and (4) during the Rampdown, each acre-foot of a Party's Production in excess of (1) [through] (3) above, excluding Production from Stored Water and/or Carry Over water, except that the United States shall be subject to the Administrative Assessment only on the actual Production of the United States.

The apparent intent of this language is to ensure that all Production is subject to the Administrative Assessment. Levying the assessment against the entire Production Right and right to Produce Imported Water Return Flows whether or not the full right is produced in that year ensures that the Administrative Assessment is collected for the Production in a later year of the resulting Carry Over water (which would otherwise escape levy of the Administrative Assessment). Allowing Carry Over of either Pre-Rampdown Production amounts in excess of a Production Right, or Federal Reserved Water Rights would result in the eventual Production of that Carry Over without the payment of an Administrative Assessment:

- Administrative Assessments on Pre-Rampdown Production amounts in excess of a Production Right are only levied on "each acre-foot of a Party's Production in excess of" their Production Right, right to Imported Water Return Flows, or Production on which a Replacement Water Assessment is imposed.
- Administrative Assessments on the Federal Reserved Water Right are limited in Section 9.1 of the Judgment to: (a) the amount actually Produced by the United States; or (2) the portion of the Federal Reserved Water Right not used by the United States that is allocated to and actually Produced by Non-Overlying Production Rights holders pursuant to Paragraph 5.1.4.1 of the Judgment.

#### **ADDITIONAL ISSUES TO BE CONSIDERED IN WATERMASTER DELIBERATIONS**

The plain language of the Judgment appears to clearly provide that neither Pre-Rampdown Production amounts in excess of a Production Right nor Federal Reserved Water Rights are eligible for Carry Over. However, should the Watermaster believe that further analysis of the intent of the Judgment is required, the following issues should be considered in that analysis.

#### **Expanding the Ability to Carry Over Water Adds to Overdraft of the Basin**

The Statement of Decision dated December 23, 2015 is an important document to evaluate the intent of the Judgment, if the plain language is not sufficient. A primary conclusion of the Statement of Decision is that "The Physical Solution . . . provides for a sustainable groundwater supply for all parties now and in the future" (Statement of Decision at page 28, lines 13-14). "The Physical Solution will protect all water rights in the Basin by preventing future overdraft,



improving the Basin's overall groundwater levels, and preventing the risk of new land subsidence" (Id. at page 21, lines 23-25). The Physical Solution addresses overdraft by "additional importation of water into the Basin and thus additional return flows which will help to restore groundwater levels in the Basin" by requiring purchase of imported water to offset Production by existing groundwater users that exceeds their Production Rights, and to offset new Production (Id. at page 22, lines 3-9).

Production of Carry Over water does not result in a Replacement Water Assessment, so that such production is not offset by the purchase of imported water. If the basis for the Carry Over is not a Production Right or a right to Produce Imported Water Return Flows, then that Production would contribute to overdraft in the Basin. Particularly strong evidence may be needed to support an interpretation of the Judgment which allows such additional overdraft, given that it is contrary to the fundamental objective of the Judgment. The alternatives to the interpretation identified in the Carry Over Issue Paper would both result in greater overdraft:

- An interpretation to allow Carry Over of any Party's unused Pre-Rampdown Production that is higher than the Party's Production Right would ultimately increase overdraft by allowing Groundwater Production that is not offset by purchase of an offsetting amount of imported water.
- An interpretation to allow Carry Over of the unused portion of the Federal Reserved Water Right would result in substantial additional Production in Groundwater in the Basin that is not offset by the purchase of Replacement Water.

Finally, it is noted that the Public Water Suppliers' "Steering Committee" has also proposed an interpretation of the Judgment which may expand the Parties with Pre-Rampdown Production values beyond the Exhibit 4 Parties that have Pre-Rampdown Production values in the Judgment as written. This expansion, in combination with an interpretation of the Judgment that allows Carry Over of Pre-Rampdown Production that is greater than the Production Right, would further increase the amount of overdraft in the Basin.

#### **The Interpretation of the Judgment Should Consider All Years in the Rampdown Period, and Not Just Years Three Through Seven.**

The discussion of the potential to allow Carry Over of any Party's unused Pre-Rampdown Production that is higher than the Party's Production Right at the Advisory Committee meetings has focused on Carry Over in years three through seven of the Rampdown Period. Under the interpretation of the Judgment language presented in the Carry Over Issue Paper, evaluation of Carry Over would also be needed for years one and two of the Rampdown Period, because Carry Over is computed based on the non-use of clearly-defined Production Rights in all years.

If the Judgment is interpreted to allow Carry Over based a Party's unused Pre-Rampdown Production that is higher than the Party's Production Right, some consideration is needed about how Carry Over should be computed in years one and two of the Rampdown Period. Pre-Rampdown Production values do not appear to apply to those years, and instead there is no limit on the amount that Parties can produce without having to pay a Replacement Water Assessment. This can lead to treatment of Carry Over in years one and two that seems unreasonable:



- If the interpretation is that Pre-Rampdown Production values do not apply in years one and two, then Carry Over might be limited to non-use of Production Rights, and this leads to an odd "jump" in the amount of water that can be Carried Over from years one and two (based on Production Rights) to year three (based on Pre-Rampdown Production);
- If the interpretation is that Pre-Rampdown Production values should be used to define Carry Over in years one and two, an explanation is needed to justify the use of Pre-Rampdown Production values in years where it has no relevance in determining what Production may be subject to Replacement Water Assessments;
- If the interpretation is that Carry Over should apply to the potential to Produce Groundwater in excess of Production Rights without being subject to Replacement Water Assessments, an unlimited amount of Carry Over would be generated in years one and two.

**The Treatment of Carry Over in the Agreement Between AVEK and Waterworks District No. 40 Should Be Considered in Evaluating Carry Over of Federal Reserved Water Rights**

The provisions of the agreement between AVEK and Waterworks District No. 40 for lease of Overlying Production Rights (provided as Appendix O to the 2016 Annual Watermaster Report) provide some insight into how two of the larger Parties to the Judgment interpret the application of Carry Over water. Under that lease, while AVEK allows Waterworks District No. 40 to Produce groundwater under AVEK's Exhibit 4 Production Right under certain terms, the agreement assumes that the Watermaster would credit AVEK with Carry Over based on non-use of AVEK Production Rights.<sup>1</sup>

This lease seems analogous with the treatment of the Federal Reserved Water Right, where Non-Overlying Parties can use the Federal Reserved Water Right to Produce Groundwater without incurring Replacement Water Assessments (analogous to Waterworks District No. 40's rights to water leased from AVEK), while any potential Carry Over would be credited to the United States if they were a Party entitled to Carry Over (analogous to AVEK's rights under the agreement). The analogy is strengthened by the language in Section 5.1.4.1 of the Judgment, which expressly provides that "Production of unused Federal Reserved Water Right Production does not increase any Non-Overlying Production Rights holder's decreed Non-Overlying Production Right."

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<sup>1</sup> While the agreement does transfer Carry Over from AVEK to Waterworks District No. 40, it does show that these Parties interpreted the default position for the Watermaster is that Carry Over is generated for the holder of the Production Right, and not for the Party with a right to Produce Groundwater free from a Replacement Water Assessment based on that right.





# MEMO

**To:** Watermaster Advisory Committee  
**From:** Ronald D. Smith, General Manager  
**Date:** September 19, 2017  
**Re:** Carry Over Water Production Rights

***Question: Does a Party receive Carry Over Production Rights during the Reduction of Production period of years 3–7 of the Rampdown if they produce less than they are allowed to produce in any given year?***

During the Rampdown period, the Judgement specifically lists water production as: Production Right, Water Return Flow, Replacement Obligation, Carry Over Water, Stored Water, and Federal Water. It describes another type of groundwater production but does not have a specific name for it. This is the groundwater that may be produced during years 3-7 of the Rampdown which is greater than the Party's final Production Right, described in Paragraph 5.1, "progressively reduced, as necessary, in equal increments, from its Pre-Rampdown Production to its Production Right. For the sake of this discussion that production will be referred to as "Reduction Right".

There are two positions as to the question: A Party receives Carry Over if they produce less than the sum of their Production Right and their Reduction Right in any given year during years 3–7, versus a Party is not entitled to Carry Over unless they produce less than their Production Right in any given year during years 3–7.

The later argument has been supported by the interpretation that Paragraph 3.5.32 defines Production Right as, "[t]he amount of native Safe Yield that may be Produced each Year free of any Replacement Water Assessment and Replacement Obligation...". Also, that the Native Safe Yield is a defined finite number and the Reduction Water is greater than the finite number.

Paragraph 8.3 states: "...the amount each Party MAY PRODUCE from the NATIVE SAFE YIELD...any amount Produced over the required reduction shall be subject to Water Assessment". (*emphasis added*)

It is clear that the Judgement, by using "MAY PRODUCE", creates a production right "free of any Replacement Water (3.5.32)" from the "NATIVE SAFE YIELD". This means that a Party has the production right to produced from the Native Safe Yield the Reduction Water free of any Replacement Water.

The Party should then be entitled to Carry Over for producing less than the sum of the Reduction Water and their Production Right; if a Party produces more than that amount they create a Replacement Obligation. E.g. A Party has a Production Right of 500 AFY on Exhibit 4; if during 2018 they may produce from the Native Safe Yield 2500 AF (500 AF Production Right + 2000 AF Reduction Right) and the Party produces 2000 AF in 2018, it's entitled to Carry Over its right to the unproduced portion.

The intent of the Rampdown Period was not to punish those that produce less than what they were given a right to produce in any given year, but rather provide a mechanism to make adjustments to achieve the final Production Right.

Does this Carry Over create a net reduction in the total Groundwater which would not have been created if produced in 2018? No: whether the Party produces that 500 AF in 2018 or during a future year, it would be the same reduction in the total Groundwater that was accounted for in the Reduction of Production in 8.3.

Additionally, since there is no onus as to whether Reduction Right or Production Right water is produced first—these two types of water are assessed differently—one could argue that in the example above the Party produced its full Reduction Right first (2000 AF) and never produced its Production Right (500 AF). Therefore since the Party did not produce any of its Production Right in 2018, it creates Carry Over.

***Question: If a Non-Overlying Production Right holder does not produce all of its allocated Federal Reserve Water Production Right in any given year, does it create Carry Over?***

This question becomes more complicated because 5.1.4.1 states that "...Production of unused Federal Reserve Water Right Production does not increase any Non-Overlying Production Right holder's decreed Non-Overlying Production Right..." So one could argue that since the Production Right was not increased, there is no Carry Over created if less than the allocation is produced.

But, while it does not increase the Production Right on Exhibit 3, it does create a right to produce. The other complication is that this Federal Reserve Water Right Production is not exempt from Replacement Obligation as defined in 3.5.39, or in 5.1.4.1. It was not the intent of the Judgement that a Party on Exhibit 3 which produces such allocation would pay Replacement Water Assessment for that production.

Therefore, the same argument could be made as with the first question that the Party has a production right to produce the allocation free of any Replacement Water Assessment; there would be no net reduction in total Groundwater change if taken in 2018 or another year.