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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA

ANTELOPE VALLEY
GROUNDWATER CASES

Included Actions:

Los Angeles County Waterworks District No. 40 v. Diamond Farming Co. Superior Court of California County of Los Angeles, Case No. BC 325 201 Los Angeles County Waterworks District No. 40 v. Diamond Farming Co. Superior Court of California, County of Kern, Case No. S-1500-CV-254-348Wm. Bolthouse Farms, Inc. v. City of Lancaster Diamond Farming Co. v. City of Lancaster Diamond Farming Co. v. Palmdale Water Dist. Superior Court of California, County of Riverside, consolidated actions, Case No. RIC 353 840, RIC 344 436, RIC 344 668

Judicial Council Coordination Proceeding
No. 4408

Santa Clara Case No. 1-05-CV-049053
Assigned to The Honorable Jack Komar

**AGWA's OPPOSITION TO MOTIONS
FOR APPOINTMENT OF EXPERT BY
WOOD CLASS AND WILLIS CLASS**

Date: April 24, 2009
Time: 9:00 AM
Court: Los Angeles Superior Court
Dept.: 1

1 The Antelope Valley Groundwater Agreement Association (“AGWA”) opposes the *Renewed*
2 *Motion for Appointment of Expert* by the Wood Class, filed March 30, 2009, and the *Motion for*
3 *Appointment of an Expert* filed March 3, 2009, by the Willis Class (the “Motions”). AGWA joined
4 in the original Motion filed by the Wood Class, and AGWA continues to believe that the Court can
5 and *must* appoint an expert, to be paid for by the purveyors, to provide technical support to the
6 landowners. However, AGWA does not believe the manner of doing so as proposed in the Motions
7 is the most effective or fair, as it would show an unjustified preference for two groups of landowners
8 over many other similarly situated landowners. In section IV of this Opposition, AGWA proposes
9 an alternative approach that it believes is better suited to the realities of this case. Further, AGWA
10 believes the Motions expose concerns regarding the utilization of the class action mechanism in this
11 case.

12 I. Background

13 Each of the Motions request that the Court “appoint” an expert to provide technical advice to
14 the Classes. Each motion further indicates that the Purveyors should bear the financial responsibility
15 for these experts. While the issue of attorney fees for Class counsel has not previously been
16 addressed by the Court, it is presumed that there is an expectation that at some point the Purveyors
17 will also be given the financial responsibility for these expenses. Thus, if the motions are granted,
18 the defense of the adjudication for the dormant landowner and the small pumper classes will be fully
19 subsidized by the Purveyors.

20 The sole reason given to justify this subsidization is that the classes need technical help and
21 the costs for this help will not be recoverable at the end of the litigation. These are valid points, but
22 they apply equally to other landowners and landowner groups such as AGWA. Functionally
23 speaking, there is no difference between AGWA and the Wood Class: both are composed of a group
24 of landowner parties who share common interests in the litigation and have limited financial
25 resources. The only difference between the groups is the number of people involved in each.

26 From AGWA’s perspective, the economics of this case – pitting the financial resources of the
27 County of Los Angeles and numerous other public agencies against small family farmers – suggests
28

1 that much more should be done to equalize the litigation resources of the landowners than simply the
2 appointment of an expert for the Wood Class and the Willis Class.

3 II. Economics of the Adjudication

4 The purpose of this adjudication is to initiate a process of management of the water resources
5 of the Antelope Valley. There are many ways to accomplish this – an adjudication is just one of
6 them. On one side of this lawsuit are the Purveyors such as Los Angeles County Waterworks who
7 possess vast financial resources. On another side are large landowning entities such as the City of
8 Los Angeles, Tejon Ranchcorp, Bolthouse Properties and Diamond Farming, each with their own
9 independent interests. Caught in the middle are the hundreds and thousands of mid-sized property
10 owners that have formed the cornerstone of the Antelope Valley community for generations.

11 Prior to the current economic crisis it was very difficult for these landowners to defend
12 themselves in the lawsuit. Given the current economic climate,¹ it is impossible. The small to mid-
13 sized landowners who compose the vast majority of defendants simply cannot afford the legal and
14 technical expenses associated with defense of the case.

15 Where public agencies have chosen an adversarial institutional process that by its very nature
16 makes it impossible for the citizen defendants to defend themselves, and where this process was
17 chosen over potentially less burdensome alternatives, there is a legitimate question whether due
18 process concerns are implicated.

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23 ¹ The *Hay Market News*, part of the USDA Market News, reports hay produced in 2008 and stored in
24 the barn for sale has already dropped in price about 20% from the same time last year. (See USDA
25 Market News, California Weekly Hay Report for Apr. 10, 2009.) Because of the overall recession in
26 the economy and the depressed dairy industry, significant further reductions in hay prices are
27 predicted. (USDA Agricultural Marketing Service, Livestock & Grain Market News, *Alfalfa Hay*
28 *2009 Year-to-Date Cumulative California Market Summary, Antelope Valley-Mojave Desert*
(estimating 2009 Alfalfa “Good” hay prices at \$189.23/ton to date, compared with an average of
\$220-\$240 the same time last year); California Farm Bureau Federation, *California Alfalfa Prices*
for Selected Growing Areas (Mar. 11, 2009). Compounding this impact, because of this year’s
unusually cold weather, hay yields will be less than last year which will add further reduce growers’
income.

1 **III. Issues Raised By the Motions**

2 The Motions and the class structure that underlies them raise serious concerns as to whether
3 it is appropriate or equitable to utilize a class action mechanism in this case. Among them, are the
4 following:

- 5 1. In the papers of Willis class counsel regarding class certification, it was represented that:
6 “Although the firm [of Krause, Kalfayan, Benink & Slavens LLP] has limited experience
7 in water adjudications, that is ameliorated by the fact that there are several more
8 experienced firms representing large overlying landowners” (Putative Class
9 Plaintiff’s Response to Motion of Public Water Suppliers for Certification of Defendant’s
10 Class, filed February 22, 2007, page 6 lines 16-18.) Who are these other firms? What did
11 this statement commit the class to by way of deference to these counsel? For the purpose
12 of the motions regarding expert fees, what sense does it make for the class to have
13 subsidized expert support rather than the “several more experienced firms” whose
14 participation is the ameliorating factor which justified certification?
- 15 2. The Court never held an evidentiary hearing on certification of the classes. Thus, the only
16 grounds upon which the class certification decision was based were the pleadings
17 themselves. If something in these papers turns out to be inaccurate, because, for example,
18 the other firms representing the large overlying landowners cannot afford to properly
19 defend the case, how does this impact certification?
- 20 3. Currently the vast majority of landowners are relegated to classes, but there has been no
21 discussion about how the attorneys for the classes will be paid. This has created a specter
22 of doubt and suspicion among the landowners and is inhibiting the ability of the
23 landowners to work together effectively. The Court should eliminate this uncertainty now
24 and make a ruling as to whether and under what conditions the class attorneys will be
25 entitled to their fees. If the Court is going to take action which is based upon the financial
26 circumstances of the classes (such as the inability to hire an expert), then it should
27 address the full scope of class finances.
- 28

- 1 4. The Court also should address now whether fees are available under Code of Civil
2 Procedure section 1021.5 to someone representing a group of people, albeit a large group
3 of people, who are pursuing their own economic benefit to the potential detriment of
4 other groups of people. If so, then a reason needs to be given why a similar class action
5 suit cannot be brought on behalf of all medium sized landowners (the members of
6 AGWA), with availability of subsidized legal and expert fees also available to this class.
- 7 5. In the renewed Motion filed by the Wood Class, the statement is made that: "It is
8 anticipated that this expert will be directed and supervised in his work by class counsel,
9 with the involvement of counsel for the public water suppliers." (Renewed Motion filed
10 March 30, 2009, page 3, lines 18-19.) It is unclear what is meant by this statement and
11 there is no explanation of it in the rest of the pleading. If the Court is considering
12 granting the Renewed Motion, it must not do so before clarifying what is meant by this
13 relationship and how it is proposed to work logistically. The Court should also inquire
14 why it is specified that it is the "public water suppliers" whose input will be sought, and
15 not input from the other landowners.

16

17 IV. Proposed Alternative Approach

18 There is a great deal of diversity of interest among the landowners and it is very difficult for
19 them to become organized. Already the Court has seen that the landowners are at odds with one
20 another. It would be helpful for the landowners to become organized and participate in the litigation
21 in a more efficient manner. It is this type of goal that lies behind the current effort to formulate
22 uniform discovery and is the reason that the purveyors have on more than one occasion raised the
23 idea of liaison counsel.

24 In another recent adjudication, the Santa Maria Groundwater Adjudication, this role was
25 filled by the Santa Maria Valley Water Conservation District. While landowners participated
26 individually and in groups in the litigation, the primary litigation burden was focused through the
27 Conservation District on behalf of all landowners.

1 In order to mimic this situation, a “pool” of landowners should be created in this adjudication
2 in order to provide a unified voice to landowner concerns. This devise has been used elsewhere. The
3 Chino Basin was adjudicated in the mid-1970s and utilized a “pool” or committee structure in order
4 to organize the various interests so that a settlement could be reached. In the Chino Basin, two
5 overlying pools were created during the litigation in order to facilitate settlement discussions. These
6 pools became a part of the Watermaster structure under the final judgment and exist to this day and
7 are the vehicles through which the landowners participate in the ongoing administration of the case.
8 (See relevant excerpts from the Chino Basin judgment attached hereto as Exhibit “A.”) Currently the
9 Purveyors pay all costs (technical and legal) for the pool of agricultural landowners including the
10 State of California. (See relevant excerpt from the 2000 Peace Agreement for the Chino Basin,
11 attached hereto as Exhibit “B.”)²

12 Participation in the Pool should be completely voluntary. However, the Court should appoint
13 the expert requested by the Classes to be the expert for the Pool. Members of the Pool would
14 participate according to Pool rules, and control of the expert will be according to these Rules. The
15 ability to have a say in the work of the technical expert will therefore serve as an incentive to
16 encourage voluntary participation by the landowners.

17 Alternatively, the Court should consider the option highlighted in the filing by the City of
18 Palmdale on the issue of a jury trial filed February 10, 2009. In that filing, the City of Palmdale
19 describes a reference procedure under Water Code 2000, et seq., for water adjudications through
20 which the State Water Resources Control Board acts as a technical referee and conducts an
21 investigation and analysis of technical information for the benefit of the Court. Such a reference
22 would help to resolve the inequities with respect to technical analysis in this case, and may, as
23 described by the City of Palmdale, also resolve the issue of the availability of a jury trial.

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26 ² AGWA has provided only excerpts from the relevant documents in order to show the Court that
27 this proposal is realistic and utilized successfully in another adjudication. If the Court is willing to
28 consider this proposal, full copies of all relevant documents can be provided along with further
briefing on the subject. Full copies of all documents can also be found on the Chino Basin
Watermaster website at www.cbwm.org.

1
2 Dated: April 13, 2009
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**BROWNSTEIN HYATT FARBER
SCHRECK, LLP**

5 By: 
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ATTORNEYS FOR AGWA
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Exhibit A

Rec'd 8:50am
Jan 27, 1978
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FILED - West District
San Bernardino County Clerk

OCT 26 1989

Caru Jennings

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

MICROFILMED

CHINO BASIN MUNICIPAL WATER DISTRICT,

Plaintiff,

v.

CITY OF CHINO, et al.

Defendants.

No. 164327

RCN 51010

JUDGMENT

ROUTING
Date
Index
Asst. Co. Clerk
Secretary
Supervisor
2061 BUSINESS CENTER DRIVE
IRVINE, CALIFORNIA 92715
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LAW OFFICES
DONALD D. STARK
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1 quantity and quality of said water resources may thereby be pre-
2 served and the beneficial utilization of the Basin maximized.

3 42. General Pattern of Operations. It is contemplated that
4 the rights herein decreed will be divided into three (3) operating
5 pools for purposes of Watermaster administration. A fundamental
6 premise of the Physical Solution is that all water users dependent
7 upon Chino Basin will be allowed to pump sufficient waters from the
8 Basin to meet their requirements. To the extent that pumping
9 exceeds the share of the Safe Yield assigned to the Overlying
10 Pools, or the Operating Safe Yield in the case of the Appropriative
11 Pool, each pool will provide funds to enable Watermaster to replace
12 such overproduction. The method of assessment in each pool shall
13 be as set forth in the applicable pooling plan.

14 B. POOLING

15 43. Multiple Pools Established. There are hereby established
16 three (3) pools for Watermaster administration of, and for the
17 allocation of responsibility for, and payment of, costs of re-
18 plenishment water and other aspects of this Physical Solution.

19 (a) Overlying (Agricultural) Pool. The first pool shall
20 consist of the State of California and all overlying producers
21 who produce water for other than industrial or commercial
22 purposes. The initial members of the pool are listed in
23 Exhibit "C".

24 (b) Overlying (Non-agricultural) Pool. The second pool
25 shall consist of overlying producers who produce water for
26 industrial or commercial purposes. The initial members of
27 this pool are listed in Exhibit "D".

28 (c) Appropriative Pool. A third and separate pool shall

1 consist of owners of appropriative rights. The initial
2 members of the pool are listed in Exhibit "E".

3 Any party who changes the character of his use may, by sub-
4 sequent order of the Court, be reassigned to the proper pool; but
5 the allocation of Safe Yield under Paragraph 44 hereof shall not be
6 changed. Any non-party producer or any person who may hereafter
7 commence production of water from Chino Basin, and who may become a
8 party to this physical solution by intervention, shall be assigned
9 to the proper pool by the order of the Court authorizing such
10 intervention.

11 44. Determination and Allocation of Rights to Safe Yield of
12 Chino Basin. The declared Safe Yield of Chino Basin is hereby
13 allocated as follows:

14 <u>Pool</u>	<u>Allocation</u>
15 Overlying (Agricultural) Pool	414,000 acre feet in any five 16 (5) consecutive years.
17 Overlying (Non-agricultural) Pool.	7,366 acre feet per year.
18 Appropriative Pool	49,834 acre feet per year.

19 The foregoing acre foot allocations to the overlying pools are
20 fixed. Any subsequent change in the Safe Yield shall be debited or
21 credited to the Appropriative Pool. Basin Water available to the
22 Appropriative Pool without replenishment obligation may vary from
23 year to year as the Operating Safe Yield is determined by Water-
24 master pursuant to the criteria set forth in Exhibit "I".

25 45. Annual Replenishment. Watermaster shall levy and collect
26 assessments in each year, pursuant to the respective pooling plans,
27 in amounts sufficient to purchase replenishment water to replace
28 production by any pool during the preceding year which exceeds that

1 pool's allocated share of Safe Yield in the case of the overlying
2 pools, or Operating Safe Yield in the case of the Appropriative
3 Pool. It is anticipated that supplemental water for replenishment
4 of Chino Basin may be available at different rates to the various
5 pools to meet their replenishment obligations. If such is the
6 case, each pool will be assessed only that amount necessary for the
7 cost of replenishment water to that pool, at the rate available to
8 the pool, to meet its replenishment obligation.

9 46. Initial Pooling Plans. The initial pooling plans, which
10 are hereby adopted, are set forth in Exhibits "F", "G" and "H",
11 respectively. Unless and until modified by amendment of the
12 judgment pursuant to the Court's continuing jurisdiction, each
13 such plan shall control operation of the subject pool.

14 C. REPORTS AND ACCOUNTING

15 47. Production Reports. Each party or responsible party
16 shall file periodically with Watermaster, pursuant to Watermaster
17 rules, a report on a form to be prescribed by Watermaster showing
18 the total production of such party during the preceding reportage
19 period, and such additional information as Watermaster may require,
20 including any information specified by the affected Pool Com-
21 mittee.

22 48. Watermaster Reports and Accounting. Watermaster's
23 annual report, which shall be filed on or before November 15 of
24 each year and shall apply to the preceding year's operation, shall
25 contain details as to operation of each of the pools and a certi-
26 fied audit of all assessments and expenditures pursuant to this
27 Physical Solution and a review of Watermaster activities.
28 - - - - -

EXHIBIT "F"
OVERLYING (AGRICULTURAL) POOL
POOLING PLAN

1. Membership in Pool. The State of California and all producers listed in Exhibit "C" shall be the initial members of this pool, which shall include all producers of water for overlying uses other than industrial or commercial purposes.

2. Pool Meetings. The members of the pool shall meet annually, in person or by proxy, at a place and time to be designated by Watermaster for purposes of electing members of the Pool Committee and conducting any other business of the pool. Special meetings of the membership of the pool may be called and held as provided in the rules of the pool.

3. Voting. All voting at meetings of pool members shall be on the basis of one vote for each 100 acre feet or any portion thereof of production from Chino Basin during the preceding year, as shown by the records of Watermaster.

4. Pool Committee. The Pool Committee for this pool shall consist of not less than nine (9) representatives selected at large by members of the pool. The exact number of members of the Pool Committee in any year shall be as determined by majority vote of the voting power of members of the pool in attendance at the annual pool meeting. Each member of the Pool Committee shall have one vote and shall serve for a two-year term. The members first elected shall classify themselves by lot so that approximately one-half serve an initial one-year term. Vacancies during any term shall be filled by a majority of the remaining members of the Pool Committee.

5. Advisory Committee Representatives. The number of

1 representatives of the Pool Committee on the Advisory Committee
2 shall be as provided in the rules of the pool from time to time
3 but not exceeding ten (10). The voting power of the pool on the
4 Advisory Committee shall be apportioned and exercised as deter-
5 mined from time to time by the Pool Committee.

6 6. Replenishment Obligation. The pool shall provide funds
7 for replenishment of any production by persons other than members
8 of the Overlying (Non-agricultural) Pool or Appropriator Pool, in
9 excess of the pool's share of Safe Yield. During the first five
10 (5) years of operations of the Physical Solution, reasonable
11 efforts shall be made by the Pool Committee to equalize annual
12 assessments.

13 7. Assessments. All assessments in this pool (whether for
14 replenishment water cost or for pool administration or the allo-
15 cated share of Watermaster administration) shall be in an amount
16 uniformly applicable to all production in the pool during the
17 preceding year or calendar quarter. Provided, however, that the
18 Agricultural Pool Committee, may recommend to the Court modifica-
19 tion of the method of assessing pool members, inter se, if the
20 same is necessary to attain legitimate basin management objectives,
21 including water conservation and avoidance of undesirable socio-
22 economic consequences. Any such modification shall be initiated
23 and ratified by one of the following methods:

24 (a) Excess Production. In the event total pool
25 production exceeds 100,000 acre feet in any year, the Pool
26 Committee shall call and hold a meeting, after notice to all
27 pool members, to consider remedial modification of the
28 assessment formula.

1 (b) Producer Petition. At any time after the fifth
2 full year of operation under the Physical Solution, a peti-
3 tion by ten percent (10%) of the voting power or membership
4 of the Pool shall compel the holding of a noticed meeting
5 to consider revision of said formula of assessment for re-
6 plenishment water.

7 In either event, a majority action of the voting power in attend-
8 ance at such pool members' meeting shall be binding on the Pool
9 Committee.

10 8. Rules. The Pool Committee shall adopt rules for con-
11 ducting meetings and affairs of the committee and for adminis-
12 tering its program and in amplification of the provisions, but not
13 inconsistent with, this pooling plan.
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EXHIBIT "G"
OVERLYING (NON-AGRICULTURAL) POOL
POOLING PLAN

1. Membership in Pool. The initial members of the pool, together with the decreed share of the Safe Yield of each, are listed in Exhibit "D". Said pool includes producers of water for overlying industrial or commercial (non-agricultural) purposes, or such producers within the Pool who may hereafter take water pursuant to Paragraph 8 hereof.

2. Pool Committee. The Pool Committee for this pool shall consist of one representative designated by each member of the pool. Voting on the committee shall be on the basis of one vote for each member, unless a volume vote is demanded, in which case votes shall be allocated as follows:

The volume voting power on the Pool Committee shall be 1,484 votes. Of these, 742 votes shall be allocated on the basis of one vote for each ten (10) acre feet or fraction thereof of decreed shares in Safe Yield. (See Exhibit "D".) The remaining 742 votes shall be allocated proportionally on the basis of assessments paid to Watermaster during the preceding year.*

3. Advisory Committee Representatives. At least three (3) members of the Pool Committee shall be designated by said committee to serve on the Advisory Committee. The exact number of such representatives at any time shall be as determined by the Pool Committee. The voting power of the pool shall be exercised in the

*Or production assessments paid under Water Code Section 72140 et seq., as to years prior to the second year of operation under the Physical Solution hereunder.

1 Advisory Committee as a unit, based upon the vote of a majority of
2 said representatives..

3 4. Replenishment Obligation. The pool shall provide funds
4 for replenishment of any production in excess of the pool's share
5 of Safe Yield in the preceding year.

6 5. Assessment. Each member of this pool shall pay an assess-
7 ment equal to the cost of replenishment water times the number of
8 acre feet of production by such producer during the preceding year
9 in excess of (a) his decreed share of the Safe Yield, plus (b) any
10 carry-over credit under Paragraph 7 hereof. In addition, the cost
11 of the allocated share of Watermaster administration expense shall
12 be recovered on an equal assessment against each acre foot of
13 production in the pool during such preceding fiscal year or calen-
14 dar quarter; and in the case of Pool members who take substitute
15 ground water as set forth in Paragraph 8 hereof, such producer
16 shall be liable for its share of administration assessment, as if
17 the water so taken were produced, up to the limit of its decreed
18 share of Safe Yield.

19 6. Assignment. Rights herein decreed are appurtenant to the
20 land and are only assignable with the land for overlying use
21 thereon; provided, however, that any appropriator who may, directly
22 or indirectly, undertake to provide water service to such overlying
23 lands may, by an appropriate agency agreement on a form approved by
24 Watermaster, exercise said overlying right to the extent, but only
25 to the extent necessary to provide water service to said overlying
26 lands.

27 7. Carry-over. Any member of the pool who produces less than
28 its assigned water share of Safe Yield may carry such unexercised

1 right forward for exercise in subsequent years. The first water
2 produced during any such subsequent year shall be deemed to be an
3 exercise of such carry-over right. In the event the aggregate
4 carry-over by any pool member exceeds its share of Safe Yield, such
5 member shall, as a condition of preserving such surplus carry-over,
6 execute a storage agreement with Watermaster.

7 8. Substitute Supplies. To the extent that any Pool member,
8 at the request of Watermaster and with the consent of the Advisory
9 Committee, takes substitute surface water in lieu of producing
10 ground water otherwise subject to production as an allocated share
11 of Safe Yield, said party shall nonetheless remain a member of this
12 Pool.

13 9. Rules. The Pool Committee shall adopt rules for adminis-
14 tering its program and in amplification of the provisions, but not
15 inconsistent with, this pooling plan.
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Exhibit B

PEACE AGREEMENT

CHINO BASIN

JUNE 29, 2000

5.4 Assessments, Credits, and Reimbursements. After the Effective Date and until the termination of this Agreement, the Parties expressly consent to Watermaster's performance of the following actions, programs or procedures regarding Assessments.

- (a) During the term of this Agreement, all assessments and expenses of the Agricultural Pool including those of the Agricultural Pool Committee shall be paid by the Appropriate Pool. This includes but is not limited to OBMP Assessments, assessments pursuant to Paragraphs 20, 21, 22, 30, 42, 51, 53, 54 both General Administrative Expenses and Special Project Expenses, 55, and Exhibit F (Overlying Agricultural Pool Pooling Plan) of the Judgment except however in the event the total Agricultural Pool Production exceeds 414,000 acre-feet in any five consecutive year period as defined in the Judgment, the Agricultural Pool shall be responsible for its Replenishment obligation pursuant to Paragraph 45 of the Judgment.
- (b) The City of Pomona (Pomona) shall be allowed a credit of up to \$2 (two) million against OBMP Assessments for its installation and operation and maintenance of its existing anion exchange project, which is hereby determined to further the purposes of the OBMP. Pomona's construction and operation of its anion exchange project was not legally compelled and Pomona had no legal duty to construct the project. For the 30 (thirty) year initial Term of this Agreement, Pomona's OBMP Assessment shall be credited \$66,667 per year, not to exceed Pomona's total BMP Assessment attributable to the project's Production for that year. Extension of the Term of this Agreement shall not extend the period of credit.
- (c) Kaiser Ventures (Kaiser) in recognition of its contribution of 25,000 acre-feet to offset Replenishment obligations for the