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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF RIVERSIDE

13 Case No.: CIV208568

14 Coordination Proceeding Special Title
(Cal. Rules of Court, Rule 3.550)

JCCP NO. 5265
CIV 208568 (~~Lead Case No.~~)

15 **MOJAVE BASIN WATER CASES**

Dept. 1, Riverside County Superior Court,
Hon. Harold W. Hopp, Judge Presiding

17 CITY OF BARSTOW,

18 Plaintiff,

**CALIFORNIA DEPARTMENT OF
FISH AND WILDLIFE'S RESPONSE
TO WATERMASTER'S MOTION TO
ADJUST FREE PRODUCTION
ALLOWANCE FOR WATER YEAR
2024-2025**

19 v.

21 CITY OF ADELANTO, ET AL,

22 Defendants.

Date: June 4, 2024

Time: 8:30 a.m.

Dept.: 1

Judge: Honorable Harold W. Hopp

Assigned for All Purposes to Dept. 1,
Honorable Harold W. Hopp, Judge Presiding
by Assignment

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INTRODUCTION

1
2 The California Department of Fish and Wildlife (Department) respectfully submits this
3 response in partial opposition to and partial support of the Motion to Adjust Free Production
4 Allowance for Water Year 2024-2025 (2024-2025 FPA Motion) filed by the Mojave Water
5 Agency, acting in its capacity as the Mojave Basin Area Watermaster (Watermaster).

6 The Department opposes the Watermaster's recommendation to increase Free Production
7 Allowance (FPA) in the Alto and Centro subareas ("Alto" and "Centro," respectively) of the
8 Mojave River Basin (Basin) for Water Year (WY) 2024-2025. It is premature to increase FPA in
9 Alto and Centro now for the first time since the entry of final judgment in *City of Barstow v City*
10 *of Adelanto* entered on January 10, 1996 (Judgment) for the following reasons: 1) Mojave River
11 surface flows entering the downstream Baja subarea of the Basin (Baja) from Centro have
12 decreased from their historical levels more than 8,900 acre-feet per year due to the
13 overproduction occurring in Alto and Centro, harming the public trust resources in Baja,
14 including riparian vegetation and threatened and endangered species, and the producers in Baja;
15 2) the increase directly contradicts the Court's ruling and the Watermaster's own
16 recommendations in 2023 to reduce FPA in Alto and Centro due to overproduction, and the
17 Watermaster's 2023 recommendation to set Alto's FPA at its current level for five years, which
18 the Court rejected; 3) the depth of groundwater in the H1-1, H1-2, H3-1, and H3-2 wells exceed
19 the maximum depth below ground listed in Exhibit H to the Judgment, indicating harm to public
20 trust resources; 4) the new model used to support Alto and Centro's increased FPA shows that to
21 date, the river flows through the Lower Narrows have decreased since entry of the Judgment and
22 any increase from replacement water has not occurred yet and will not likely do so this coming
23 water year; 5) the model has only been applied to the upper areas of the Basin, and has not been
24 completed for the Transition Zone, Centro and Baja, thus providing insufficient information to
25 support an increase in FPA; and, 6) Centro remains significantly under evaluated and data are
26 lacking to understand whether Centro is in fact receiving the water from the Transition Zone that
27 the Watermaster assumes.
28

1 In the Baja subarea, the Department supports the Watermaster’s recommendations
2 regarding the FPA in Baja and maintaining the status quo FPA of 20.5% for WY 2024-2025.
3 Baja’s FPA has been reduced almost 80% from the base annual production (BAP) in the
4 Judgment, while, as noted above, Mojave River surface flows entering the downstream Baja
5 subarea from Centro have decreased from their historical levels by more than 8,900 acre-feet per
6 year due to the overproduction occurring in Alto and Centro. Baja should not be forced to ramp
7 down even further because of overproduction occurring in other subareas.

8 Finally, the Department opposes the Watermaster’s reduction in the Production Safe
9 Yield¹ (PSY) calculation of the water use by phreatophytes (i.e., groundwater dependent riparian
10 vegetation) in Baja near the Camp Cady Wildlife Area (Camp Cady) from 2,000 acre-feet per
11 year to 984 acre-feet per year, which ignores the phreatophyte use in the rest of Baja and
12 incentivizes and rewards the destruction of public trust resources.

13 **BACKGROUND AND HISTORY**

14 The original complaint in this water adjudication was filed by the City of Barstow on May
15 30, 1990. On January 10, 1996, the Court entered the Judgment that addressed the overdraft in all
16 of the five subareas and determined that the Basin had been in a state of overdraft since at least
17 the 1950’s. (Judgment p. 45.) The Judgment was upheld on appeal in *City of Barstow v Mojave*
18 *Water Agency* (2000) 23 Cal. 4th 1224. The Department is a party to the Judgment and has
19 statutory and common law responsibilities regarding fish and wildlife resources, including their
20 habitats. (Fish & Game Code, §§ 711.7, 1802.) The Department owns and manages lands in the
21 Basin, including Camp Cady in Baja and the Mojave River Fish Hatchery in Alto. (Declaration of
22 Aaron Johnson in Support of the Department of Fish and Wildlife’s Response to Watermaster’s
23 Motion to Adjust Free Production Allowance for the 2024-2025 Water Year (Johnson Decl.) at ¶¶
24 3, 46.). The Department also owns the Mojave Narrows Regional Park in Alto. (*Ibid.*)

25 _____
26 ¹ The Judgment defines “Production Safe Yield” as follows: “The highest average Annual Amount of water
27 that can be produced from a Subarea: (1) over a sequence of years that is representative of long-term average annual
28 natural water supply to the Subarea net of long-term average annual natural outflow from the Subarea, (2) under
given patterns of Production, applied water, return flows and Consumptive Use, and (3) without resulting in a long-
term net reduction of groundwater in storage in the Subarea.” (Judgment, p. 4, II.A.4.(aa).)

1 **A. The Department Properties Overlying the Basin**

2 Camp Cady consists of 1,866 acres of land acquired between 1979 through 2001 for a
3 total cost of \$2,046,481, using state bond monies. (Johnson Decl. ¶¶ 41, 46.) Camp Cady had
4 extensive surface water and critical public trust resources, including riparian habitat, when it was
5 acquired, which was one of the main reasons it was purchased. (*Ibid.*)

6 In 2001, the Department purchased the 314-acre Hilarides property at a total cost of
7 \$819,350. (*Id.* at ¶ 51.) The purchase included 900 acre-feet of water rights in addition to the
8 land. (*Ibid.*) The Hilarides property is located in Baja adjacent to Camp Cady and is now part of
9 the designated Camp Cady Wildlife Area. (*Ibid.*)

10 The 1,647-acre Palisades Ranch was acquired by Western Rivers Conservancy in 2018
11 using grant funding from the U.S. Fish and Wildlife Service and the state Wildlife Conservation
12 Board and was subsequently transferred to the Mojave Desert Land Trust for long-term protection
13 and management. Palisades Ranch is in the Alto Transition Zone and includes extensive riparian
14 forest habitat within the Figure H-1 area. (*Id.* at ¶ 52.)

15 The Department therefore has extensive knowledge of the Basin, its workings and its
16 history and is involved on a day-to-day basis with the management of critical public trust
17 resources overlying the Basin.

18 **B. The Terms of the Judgment**

19 The Judgment established a limit on the amount of water each subarea could produce
20 without replacement obligations in one year known as FPA, which can be adjusted on an annual
21 basis. Pursuant to the gradual rampdown in production required by the Judgment, Exhibit H to the
22 Judgment requires Watermaster to recommend a five percent (5%) decrease in the FPA for a
23 subarea when that subarea's FPA exceeds its estimated Production Safe Yield (PSY) by 5% or
24 more on an annual water year basis. (Judgment, Exhibit H ¶ 2a.) The Judgment also established
25 each producer's initial BAP. A producer's BAP was based upon that producer's highest year of
26 water production during the base period of 1986-1990. (*Id.* at ¶ 4g.) The BAP right, or its share of
27 the FPA, is the right of each producer to a *percentage* of the FPA within a given subarea each
28

1 year. (*Ibid.*) For example, in Baja the Department owns 921 acre-feet of BAP in the Judgment. If
2 the FPA is set at 20.5% of BAP, the Department can produce 189 acre-feet without any
3 replacement water obligations.

4 As part of the Judgment, the Department supported certain terms that were designed to
5 protect the State of California’s public trust resources, which the Department has the
6 responsibility to protect. One such term, as mentioned above, is that Exhibit H to the Judgment
7 requires Watermaster to recommend a 5% decrease in the FPA for a subarea when that subarea’s
8 FPA exceeds its estimated PSY by 5% or more on an annual water year basis. (Judgment Exhibit
9 H ¶ 2a.)

10 More important to this motion, however, is that paragraph 2a of Exhibit H in the Judgment
11 reads: “In considering whether to increase or decrease the Free Production Allowance in a
12 Subarea, Watermaster shall, among other factors, take into consideration for the areas shown on
13 Figure H-1, the Consumptive Use of water by riparian habitat, the protection of public trust
14 resources, including the species listed in Table H-1 and the riparian habitat areas shown on Figure
15 H-1, and whether an increase would be detrimental to the protection of public trust resources.”
16 (Declaration of Kit Custis in Support of the Department of Fish and Wildlife’s Response to
17 Watermaster’s Motion to Adjust Free Production Allowance for the 2024-2025 Water Year
18 (Custis Decl.) at ¶ 8.) The Watermaster, and the Court, must therefore take into consideration the
19 protection of public trust resources and determine whether an increase in FPA “would be
20 detrimental to public trust resources” before deciding whether to increase the FPA in any subarea.

21 **C. The Public Trust Doctrine in Water Rights Cases**

22 The public trust doctrine in the field of California water rights represents the state’s
23 authority to exercise continuous supervision and control over ecological and recreational interests
24 dependent on navigable waters of the state, tributary non-navigable waters of the state, and the
25 lands underlying those waters. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d
26 419, 425.) “Before state courts and agencies approve water diversions, they should consider the
27 effect of such diversions upon interests protected by the public trust, and attempt, so far as
28

1 feasible, to avoid or minimize any harm to those interests.” (*Id.* at p. 426.) Courts have
2 recognized these interests to include, for example, “the scenic views of [a] lake and its shore, the
3 purity of the air, and the use of [a] lake for nesting and feeding by birds.” (*Id.* at p. 435.)

4 The doctrine also extends to groundwater and its effects on public trust resources.
5 (*Environmental Law Foundation v. State Water Resources Control Bd.* (2018) 26 Cal.App.5th
6 844, 859.) The court in *Environmental Law Foundation* found a duty to consider any adverse
7 impacts groundwater extraction would have on a public trust resource. (*Id.* at 863.) The duty, the
8 court found, was not to regulate but to consider the impact on the public trust resource and, where
9 feasible, to preserve the public interest in its resources. (*Ibid.*) Therefore, before state courts and
10 agencies approve water diversions or water uses, they must consider the effect of such use upon
11 interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any
12 harm to those interests. (*National Audubon Society v. Superior Court, supra*, 33 Cal.3d at p. 426.)

13 Further, the public trust doctrine imposes a duty of continuing supervision over the taking
14 and use of water affecting the trust resources. (*National Audubon Society v. Superior Court,*
15 *supra*, 33 Cal.3d at p. 447.) In exercising its sovereign power to protect water resources in the
16 public interest, the state, or court, is not confined by past water allocation decisions which may be
17 incorrect in light of current knowledge or inconsistent with current needs. (*Ibid.*) In other words,
18 this court must continually take into consideration groundwater pumping’s effects on public trust
19 resources such as endangered species and riparian habitat.

20 **D. The Past and Continuing Harm to Public Trust Resources in this Basin**

21 Detailed mapping of vegetation along the Mojave River was completed by the United
22 States Geological Survey (USGS) in 1995 for the purposes of characterizing the extent of
23 vegetation communities along the Mojave River and quantifying water use by groundwater
24 dependent vegetation. (Johnson Decl. ¶ 39.) In 2016, a vegetation map for the Mojave Desert
25 including the Baja subarea, was completed on behalf of the Department’s Vegetation
26 Classification and Mapping Program by Menke et al. (*Ibid.*)

27 In 1995, USGS mapped 2,790 acres of riparian habitat in Baja, and in 2014, Menke,
28 among others, mapped approximately 2,669 acres containing the same suite of species. (*Id.* at ¶

1 40.) Most notably, the acreage of stands of Fremont’s cottonwood trees, often mixed with willow,
2 which represent the key components of desert riparian forest in the Mojave Desert, was reduced
3 by roughly 70% in Baja. Many of the riparian communities were in poor condition, dying, or dead
4 in 2014. (*Ibid.*)

5 Camp Cady, an important Department-managed property in Baja, had extensive surface
6 water and riparian habitat when it was acquired. (*Id.* at ¶ 41.) The decline in water levels has had
7 a significant negative effect on the biological resources along the Mojave River at Camp Cady
8 and throughout the Basin. (*Ibid.*) Much of the natural vegetation along the Mojave River is
9 dependent on reliable access to groundwater. (*Ibid.*) The roots of mature groundwater dependent
10 plants must be able to reach groundwater to survive and occasional surface flows and prolonged
11 periods of shallow groundwater are needed for reproduction and growth of new individuals.
12 (*Ibid.*) Reproduction of riparian woodland species is critical to sustaining these important habitat
13 areas as older individuals die off due to drought stress, wildfire, disease, age, and other causes of
14 mortality. (*Ibid.*)

15 Declining groundwater levels have caused widespread mortality within the stands of
16 cottonwood, mesquite, and willows at Camp Cady. (*Id.* at ¶ 42.) Notwithstanding these losses,
17 Camp Cady still contains valuable riparian vegetation. (*Ibid.*) Riparian vegetation is a rare habitat
18 type in the arid desert that despite only occurring on less than 1% of the landscape, provides
19 habitat for more species of birds than all other vegetation types combined. (*Ibid.*) Areas of desert
20 riparian vegetation serve as biodiversity hotspots that support wildlife from vast areas of
21 surrounding upland habitats, serve as critical bird breeding habitat, important migratory stopover
22 sites, and wintering areas for many bird species. (*Ibid.*) A total of 106 bird species have been
23 documented using riparian vegetation at Camp Cady, including southwestern willow flycatcher,
24 which is listed as endangered under the California Endangered Species Act (CESA), and least
25 Bell’s vireo, which is listed as endangered under CESA and the federal Endangered Species Act
26 (ESA). (*Ibid.*) Tricolored blackbird (*Agelaius tricolor*), a California Species of Special Concern,
27 utilize wetland vegetation associated with ponds on the property. (*Ibid.*) Habitat with a
28

1 cottonwood and willow canopy and a mesquite understory have the highest abundance of birds of
2 all habitat types at the wildlife area. (*Ibid.*)

3 Shallow and perennial surface water, as occurred at Camp Cady, is critical for
4 numerous wildlife species in Baja. (*Id.* at ¶ 45.) A 2018 publication by USGS identified a total of
5 11 species of amphibians and reptiles at Camp Cady, including southwestern pond turtle, a
6 California Species of Special Concern. (*Ibid.*) In addition, when perennial water existed in the
7 river, desert bighorn sheep, a California fully protected species, were known to visit the property
8 from the near Cady Mountains for water and continue to rely on water from the lower Mojave
9 River in nearby Afton Canyon. (*Ibid.*)

10 Due to the ecological significance of desert riparian vegetation types, the water needs of
11 these natural communities have been the subject of comprehensive study. (*Id.* at ¶ 48.) USGS
12 found that tree mortality in cottonwood-willow woodlands increased significantly on the Mojave
13 river where the water-table depth was greater than about seven feet. (*Ibid.*) The ideal water-table
14 depth for healthy tree growth was observed to be between two and four feet. (*Ibid.*) Cottonwoods
15 and willows can withstand periods of stress such as temporary reductions in the water table from
16 seven to ten feet. (*Ibid.*) However, prolonged periods of lowered groundwater resulted in near
17 complete mortality in the woodland species. (*Ibid.*) These groundwater requirements for
18 established mature cottonwoods have been substantiated by numerous other studies. (*Ibid.*)
19 Therefore, while the seven-foot minimum water table standards established in Table H-2 of the
20 Judgment for the riparian forest areas may be protective of mature trees, they should be
21 considered a minimum standard, as the general health of the community and continued
22 recruitment of new cottonwood and willow trees requires periods of shallower groundwater and
23 surface flow. (*Ibid.*) There is now a significant body of literature documenting the water needs to
24 maintain healthy cottonwood forests, which includes both intermittent surface flows and
25 groundwater levels that allow the rapidly growing root to stay in contact with groundwater. (*Ibid.*)

26 Like willows, mesquite trees and shrubs are reliant on good access to groundwater. (*Id.* at
27 ¶ 49.) USGS found healthy mesquite where the water-table depth ranged from eight to 10 feet,
28 but that mortality was extremely high where groundwater was reduced below 10 feet by pumping.

1 (*Ibid.*) Root sprouting by mesquite, as necessary for reproduction, occurred where the water table
2 was at about eight feet in the spring. (*Ibid.*) Where groundwater levels are maintained within the
3 tolerances of cottonwoods, willows, and mesquite, these native riparian species may persist and
4 compete with invasive salt cedar, but where groundwater declines beyond these thresholds salt
5 cedar is dominant, conversion to barren sand or upland shrub species occurs, and biological
6 diversity declines. (*Ibid.*)

7 As noted above, the groundwater dependent habitats along the Mojave River have
8 undergone significant environmental change due to groundwater drawdown, causing the death of
9 deep-rooted, native vegetation and the reactivation of wind-blown sand. (*Id.* at ¶ 50.) Although
10 widespread, these impacts have been perhaps most significant in Baja and Camp Cady where the
11 loss of groundwater storage has been the most significant and where the Department has devoted
12 the most attention due to the Department's land ownership and continued staff. (*Ibid.*) The loss of
13 near-surface water has converted an area near Camp Cady that was vegetated in the 1960s to a
14 dry, migrating dune field that inundates both vegetation and buildings. (*Ibid.*) Groundwater levels
15 continue to exceed the critical depth of seven to 10 feet needed to sustain a healthy riparian forest.
16 (*Ibid.*) As a result, riparian vegetation such as cottonwood and willows get scoured during large
17 flood events and their seedlings can no longer get established due to the lowered ground water
18 table. (*Ibid.*) Without competition from native vegetation, non-native salt cedar becomes
19 established and further draws down the water table. (*Ibid.*)

20 ARGUMENT

21 **I. AN INCREASE IN FPA IN CENTRO AND ALTO AT THIS TIME IS 22 PREMATURE, WHEN SURFACE FLOWS ENTERING BAJA FROM 23 CENTRO HAVE DECREASED BY MORE THAN 8,900 ACRE-FEET PER 24 YEAR.**

24 In its 2024-2025 FPA Motion, the Watermaster moves this Court for an increase in FPA
25 to Alto from 50.4% of BAP to 53.3% of BAP, and in Centro from 55% of BAP to 60% of BAP.
26 (2024-2025 FPA Motion p. 6.) This is the first time since entry of the Judgment in 1996 that such
27 a motion for an increase in FPA has been made. (Johnson Decl. ¶ 15.) The evidence submitted by
28 Robert C. Wagner (Watermaster Engineer), including his declaration attached to the 2024-2025

1 FPA Motion (Wagner Decl.), the Watermaster’s Thirtieth Annual Report (Thirtieth Annual
2 Report), and his recommendations presented to the Watermaster Board on February 28 and
3 March 27, 2024, however, do not support the Watermaster Engineer’s conclusion that the FPA in
4 Alto and Centro should be increased. In fact, that evidence demonstrates it is premature at this
5 time to increase FPA in any part of the Basin.

6 The Watermaster Engineer’s declaration and the Thirtieth Annual Report both state that
7 surface flows entering Baja, which is downstream of the other subareas of the Basin, from Centro
8 have decreased from their historical levels at the time of entry of the Judgment of 16,406 acre-feet
9 per year to 7,500 acre-feet per year. (Custis Decl. ¶ 10D.) This is a reduction of more than half the
10 surface flows reaching Baja from Centro and is more than an 8,900 acre-feet per year reduction.
11 One cause of the loss of these surface flows is the overproduction occurring in Alto and Centro.
12 (*Ibid.*) Allowing increased production at this time would therefore exacerbate this problem and
13 possibly lead to a further reduction in surface flows. (*Ibid.*) It would essentially allow Alto and
14 Centro to produce additional water at Baja’s expense. Until this reduction is addressed, it is
15 premature to increase the FPA in any subarea of the Basin. (*Ibid.*)

16 As stated previously, Paragraph 2a of Exhibit H in the Judgment requires the Watermaster
17 to determine whether an increase in production would be detrimental to the protection of public
18 trust resources, among other factors. (Judgment Exhibit H, ¶ 2a.) The reduction of surface flows
19 from Centro to Baja has contributed to decreased groundwater levels and harmed the public trust
20 resources in Baja. (Custis Decl. ¶ 10D.) Most notably, as explained above, the acreage of stands
21 of Fremont’s cottonwood trees, often mixed with willow, which represent the key components of
22 desert riparian forest in the Mojave Desert, has been reduced by roughly 70% in Baja. (Johnson
23 Decl. ¶ 40.) Many of the riparian communities are in poor condition, dying, or dead. (*Ibid.*)

24 Groundwater levels continue to exceed the critical depth of seven to 10 feet needed to
25 sustain a healthy riparian forest. (*Id.* at ¶¶ 27, 44-50.) This also harms the critical bird and
26 amphibian species that rely on these riparian habitats to survive. (*Ibid.*) In addition to these areas
27 of desert riparian vegetation serving as biodiversity hotspots, they provide critical bird breeding
28 habitat, important migratory stopover sites, and wintering areas for many bird species and provide

1 critical habitat for eleven amphibian and reptile species including the southwestern pond turtle, a
2 California Species of Special Concern. (*Ibid.*)

3 Notwithstanding these losses, Camp Cady and Baja still contain valuable riparian
4 vegetation. (*Id.* at 42.) To protect what remains and to possibly increase the riparian vegetation in
5 Camp Cady and Baja as a whole, the Watermaster, the Department, the parties to the Judgment,
6 and this Court must do all they can to return the surface flows from Centro back to Baja,
7 including the 8,900 acre-feet lost from the entry of the Judgment to today. Exhibit H of the
8 Judgment requires this and the public trust resources need it.

9 **II. IT IS PREMATURE TO INCREASE FPA IN ALTO AND CENTRO WHEN JUST LAST YEAR**
10 **THE WATERMASTER AND THE COURT FOUND SEVERE OVERPRODUCTION IN THOSE**
11 **SUBAREAS.**

12 For WY 2023-2024, the Watermaster submitted to the Court the Watermaster
13 Engineer’s Declaration attached to the 2023-2024 Rampdown Motion, the Watermaster’s
14 Twenty-Ninth Annual Report, and the presentations made by the Watermaster Engineer to the
15 Watermaster Board to support its recommendations that FPA in Alto be reduced and be
16 maintained at 50% for 5 years and that FPA in Centro be reduced by 5% due to overproduction.
17 (Johnson Decl. ¶ 12.) The Court agreed to reduce the FPA to 50.4%, noted that there has been
18 serious depletion of groundwater storage in Alto, and that maintaining FPA at its then-current
19 level in Alto was “clearly incorrect.” (*Id.* at ¶ 13.) The Court did not rule on the recommendation
20 to maintain the same pumping levels for five years. (*Ibid.*)

21 Since that time, the groundwater levels in the H1-1, H3-1 and H3-2 remain below the
22 critical seven-foot threshold, and as noted above, the surface flows from Centro to Baja are still
23 more 8,900 acre-feet below their historical level. It is therefore premature to increase FPA in Alto
24 and Centro. The Watermaster’s recommendation and Court’s findings from WY 2023-2024
25 remains the correct one for WY 2024-2025: FPA in Alto and Centro should remain at their
26 current levels.
27
28

1 **III. IT IS PREMATURE TO INCREASE FPA IN ALTO AND CENTRO WHEN**
2 **THE DEPTH OF REPRESENTATIVE GROUNDWATER WELLS INDICATE**
3 **HARM TO PUBLIC TRUST RESOURCES, INCLUDING RIPARIAN**
4 **VEGETATION AND THREATENED AND ENDANGERED SPECIES.**

5 As stated previously, Paragraph 2a of Exhibit H in the Judgment requires the Watermaster
6 to determine whether an increase in production would be detrimental to the protection of public
7 trust resources, among other factors. (Judgment Exhibit H ¶ 2a.) There are three Exhibit H, Table
8 H-2 wells in upper Alto: well H1-2 in the upstream portion of the Mojave Narrows Park; well H1-
9 1 in the upper portion of the Transition Zone; and well H2-1 in the middle portion of the
10 Transition Zone. (See Exhibit H, Figure H-1 maps.) (Custis Decl. ¶ 13D.) In addition, there are
11 two Exhibit H, Table H-2 monitoring wells in Baja, well H3-1 and well H3-2. (*Id.* at ¶ 15N, Q.)

12 Table H-2 in Exhibit H of the Judgment establishes the maximum depth to groundwater at
13 seven feet below the ground for wells H1-1, H1-2 and H3-1. (Judgment Exhibit H Table H-2.)
14 Table H-2 also sets a maximum depth for well H3-2. (*Ibid.*) Shallow groundwater levels in wells
15 H1-1 and H1-2 have been almost entirely below a depth of seven feet since approximately 2010.
16 (Custis Decl. ¶ 13D.) This indicates likely harm to riparian, endangered and threatened species in
17 Alto, as discussed above. It would be contrary to both the Judgment and the public trust doctrine
18 to increase FPA in Alto at a time when this harm is occurring.

19 The depth of groundwater in wells H3-1 and H3-2 also exceed the maximum depth listed
20 for those wells, again indicating harm to riparian, endangered and threatened species in Baja. (*Id.*
21 at ¶ 15N, Q.) In fact, the Department has installed 11 shallow monitoring wells in Baja to
22 measure the depth of groundwater levels in and around the areas of crucial riparian habitat. (*Id.* at
23 ¶ 12H.) The decrease in water storage in Baja and throughout the Basin have dried up eight of
24 these 11 monitoring wells, clearly showing ongoing harm to public trust resources. (*Ibid.*) This
25 also shows that it would be contrary to both the Judgment and the public trust doctrine to increase
26 FPA in Alto and Centro (surface and subsurface water flows in the Basin from Centro to Baja), at
27 a time when this harm is likely occurring.
28

1 **IV. IT IS PREMATURE TO INCREASE FPA IN ALTO AND CENTRO WHEN**
2 **THE POSITIVE BENEFITS ASSUMED IN THE MODEL HAVE YET TO**
3 **OCCUR.**

4 The Watermaster and Watermaster Engineer rely partly on a new model of the Upper
5 Mojave Basin prepared by the Mojave Water Agency (MWA) to establish the new PSY for Alto
6 and to support the increase in both Alto and Centro. (Custis Decl. ¶ 13a.) The Watermaster
7 Engineer’s declaration states that the model indicates that there will be increased flow through the
8 Lower and Upper Narrows to both Alto and Centro from the purchase of 17,475 acre-feet of
9 replacement water each year in Alto and that the increased flow could be as much as 9,800 acre-
10 feet per year at the Lower Narrows. (*Id.* at ¶ 13M.)

11 However, reliance on this result from the model is misplaced and premature. First, Alto
12 producers have not to date committed to actually purchasing 17,475 acre-feet of replacement
13 water to replace the deficit that exists between production and PSY in Alto. (Wagner Decl. p. 3.)
14 Second, the model output shows that the 9,800 acre-foot increased flow may only gradually occur
15 and may not occur in the next water year. (Custis Decl. ¶ 11B.) The Watermaster and
16 Watermaster Engineer provide no evidence, since it is almost certainly not the case, that this
17 water will be seen at the Lower Narrows in WY 2024-2025. Until that increase is seen at the
18 Lower Narrows, it would be premature and contrary to the Judgment to assume that the water is
19 there. This is one more reason to keep FPA at its current levels in Alto and Centro for WY 2024-
20 2025.

21 **V. IT IS PREMATURE TO INCREASE FPA IN ALTO AND CENTRO UNTIL**
22 **THE UNCERTAINTIES IN CENTRO ARE RESOLVED AND THE MODEL IS**
23 **EXTENDED TO THE LOWER MOJAVE BASIN.**

24 As discussed above, the proposed PSY for Centro and Baja subareas have lowered the
25 surface water flow at the Barstow gauge 8,904 acre-feet per year. (Custis Decl. ¶ 10D.) In fact,
26 the 20-year running average has periodically declined since 1951. (*Id.* at ¶ 14H.) This is occurring
27 despite the fact that flows to upper Alto at the Mojave Forks have occasionally increased. (*Id.* at ¶
28 14A.) Therefore, somewhere below the Lower Mojave Narrows Gauge in the Transition Zone, or
in Centro, water is being lost or produced, preventing it from reaching Baja. (*Id.* at ¶ 14M.)

1 However, the Watermaster and Watermaster Engineer are unable to explain this loss. (*Ibid.*) The
2 available evidence demonstrates that the unmeasured losses and gains to the Mojave River
3 throughout the Transition Zone could potentially be a sizeable portion of the total surface water
4 flowing into Centro. (*Id.* at ¶ 14J-L.) The inability to directly measure these inflows and outflows
5 of surface water creates a large uncertainty in the estimate of the total inflow to Centro, and
6 therefore an uncertainty in the calculation of the Centro PSY and FPA. (*Id.* at ¶ 14M.) It is
7 premature to increase the FPA in Centro and Alto when Centro inflows and outflows remain such
8 a mystery, especially when there is potential harm being done to public trust resources as a result.

9 Further, the model has only been prepared to date for the Upper Mojave Basin. (Custis
10 Decl. ¶ 11A.) The Watermaster, the Watermaster Engineer, the Department, the parties, and the
11 Court would benefit immensely from expanding the model through the Transition Zone and into
12 Centro and Baja. This would allow the model to shed some light on what is occurring in Centro,
13 although it is likely that additional wells and data are needed. (*Ibid.*) This again points to the need
14 to keep FPA steady for Alto and Centro at this time.

15 The evidence provided by the Watermaster in support of the 2024-2025 FPA Motion
16 actually supports keeping the FPA in Alto and Centro at their current levels in WY 2024-2025.
17 For example: 1) the loss of 8,900 acre-feet in surface flows from Centro to Baja has harmed and
18 will continue to harm public trust resources in Baja; 2) the depth of the monitoring wells H1-1,
19 H1-2, H3-1 and H3-2 show that public trust resources are being harmed by current groundwater
20 levels in Alto and Baja; 3) just last year the Watermaster recommended and the Court approved a
21 ramp down in production in Alto and Centro; 4) any permanent gains from the purchase of
22 replacement water in Alto have not yet occurred; and, 5) the lack of data for the Transition Zone
23 and Centro leads to an unexplained loss of surface water in the Transition Zone and Centro. To
24 increase FPA in Alto and Centro at this time would be essentially allowing Alto and Centro to
25 produce additional water at the expense of Baja and the public trust resources that continue to be
26 harmed. This is contrary to the Judgment and the public trust doctrine.

1 **VI. THE DEPARTMENT SUPPORTS THE WATERMASTER'S**
2 **RECOMMENDATION TO KEEP BAJA'S FPA AT 20.5% IN WY 2024-2025.**

3 In its 2024-2025 FPA Motion, the Watermaster recommends keeping the FPA in Baja at
4 20.5% of BAP for WY 2024-2025. (2024-2025 FPA Motion, p. 6.) Although the Department
5 disagrees with the removal of water from the water budget due to phreatophyte use, as discussed
6 below, the Department agrees that it is appropriate at this time to keep the FPA at 20.5% of BAP
7 for WY 2024-2025.

8 FPA in Baja has been reduced almost 80% since the entry of the Judgment. (Custis Decl. ¶
9 15F.) The parties in Baja have therefore had to severely cut production and production is
10 estimated to have declined 60% in the last eight years. (Wagner Decl. p. 5.) Baja's FPA has been
11 reduced far greater than any other subarea. (2024-2025 FPA Motion, p. 6.) However, Baja is the
12 most downstream basin in the adjudication area and is the last to receive Mojave River
13 stormflows. (Custis Decl. ¶ 15A.) The main source of natural recharge to Baja is stormflow on
14 the Mojave River. (*Id.* at 15B.) As discussed above, the loss of more than 8,900 acre-feet of
15 surface flows from Centro to Baja has been an important cause of the lowered groundwater levels
16 in Baja. Despite that loss, the groundwater levels in Baja have begun to stabilize. (*Id.* at 15L.)

17 It is clear, however, that public trust resources, including riparian habitat and endangered
18 and threatened species, will need groundwater levels to continue to stabilize and to increase over
19 time to improve and maintain their health. (Johnson Decl. ¶¶ 44-50.) Over the long term, this will
20 require the surface flows from Centro to Baja to return to their historical levels or for Baja to
21 recoup the lost flows through another mechanism. (Custis Decl. at ¶ 15W.) Since the surface
22 flows to Baja are highly affected by the groundwater and production levels in the other subbasins,
23 and especially Alto and Centro, the return of these historical flows will require the upper subareas
24 to produce less and purchase additional replenishment water. Increasing FPA, and hence current
25 and future production, is the exact opposite of what is needed.

26 On the other hand, further ramping down Baja at this time would be punishing Baja for
27 the overproduction in the other subareas. The Department believes that as production continues to
28 decrease in Baja, and as production slowly decreases in other subareas, groundwater levels in

1 Baja should further stabilize, and hopefully rise. (*Ibid.*) Also, if producers in other subareas, such
2 as Alto, actually purchase replenishment water, as the Watermaster projects, and the model
3 proves to be correct in its predictions about increased surface flows from Alto to Centro, this will
4 hopefully lead to a groundwater rise in Baja as well. (*Id.* at ¶ 11B.)

5 Finally, the Department has two concerns with how the Watermaster Engineer chose to
6 calculate the PSY for Baja. First, the Department opposes the calculation that reduces the
7 allocation of consumptive use by phreatophytes in Baja from 2,000 acre-feet per year to 984 acre-
8 feet per year. (Johnson Decl. ¶ 10.) The new analysis of water use by riparian vegetation
9 performed by the Watermaster Engineer to arrive at the 984 acre-feet value evaluated water use
10 only within the riparian habitat area in the vicinity of Camp Cady and seems to assume that the
11 riparian vegetation will never return. (*Ibid.*) The 2,000 acre-feet number should remain and not be
12 reduced at this time. In addition, for calculation of the water balance and PSY in Baja, all the
13 riparian vegetation in Baja should be included. (*Ibid.*)

14 Second, if phreatophyte water use in Baja is reduced in the water balance, this allows PSY
15 to be higher. (Custis Decl. 15U.) A higher PSY would then mean additional production in the
16 subarea, if FPA is increased to coincide with the higher PSY. The Department objects to the idea
17 of allowing producers to produce more water due to harm to public trust resources. Incentivizing
18 and rewarding the destruction of public trust resources is directly contrary to the Judgment and
19 the public trust doctrine. It should not be permitted.

20 CONCLUSION

21 For the foregoing reasons, the Department respectfully requests that the Court 1) deny the
22 Watermaster's 2024-2025 FPA Motion as to Alto and maintain the FPA at its current level of
23 50.4%; 2) deny the Watermaster's 2024-2025 FPA Motion as to Centro and maintain the FPA at
24 its current level of 55%; 3) grant Watermaster's 2024-2025 FPA Motion as to Baja and maintain

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1 the FPA at 20.5%; and, 4) restore the consumptive use of phreatophytes in Baja to 2,000 acre-feet
2 per year when calculating the water balance and PSY.

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Dated: May 21, 2024

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DECLARATION OF SERVICE BY E-MAIL AND OVERNIGHT COURIER

Case Name: **City of Barstow v. City of Adelanto, et al.**

Case No.: **CIV208568 (Lead)**

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 300 South Spring Street, Suite 1702, Los Angeles, CA 90013-1230. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for overnight mail with the **Federal Express** courier service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the overnight courier that same day in the ordinary course of business.

On May 21, 2024, I served the **CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE'S RESPONSE TO WATERMASTER'S MOTION TO ADJUST FREE PRODUCTION ALLOWANCE FOR WATER YEAR 2024-2025** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, for overnight delivery, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California and the United States of America, the foregoing is true and correct and that this declaration was executed on May 21, 2024, at Los Angeles, California.

Beatriz Davalos

Declarant



Signature

PROOF OF SERVICE

STATE OF CALIFORNIA }
COUNTY OF SAN BERNARDINO}

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

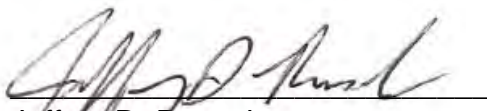
On May 22, 2024, the document(s) described below were served pursuant to the Mojave Basin Area Watermaster's Rules and Regulations paragraph 8.B.2 which provides for service by electronic mail upon election by the Party or paragraph 10.D, which provides that Watermaster shall mail a postcard describing each document being served, to each Party or its designee according to the official service list, a copy of which is attached hereto, and which shall be maintained by the Mojave Basin Area Watermaster pursuant to Paragraph 37 of the Judgment. Served documents will be posted to and maintained on the Mojave Water Agency's internet website for printing and/or download by Parties wishing to do so.

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

CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE'S RESPONSE TO WATERMASTER'S MOTION TO ADJUST FREE PRODUCTION ALLOWANCE FOR WATER YEAR 2024-2025

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

Executed on May 22, 2024 at Apple Valley, California.



Jeffrey D. Ruesch

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Mojave Basin Area Watermaster Service List as of May 22, 2024

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Mojave Basin Area Watermaster Service List as of May 22, 2024

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Mojave Basin Area Watermaster Service List as of May 22, 2024

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Mojave Basin Area Watermaster Service List as of May 22, 2024

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Mojave Basin Area Watermaster Service List as of May 22, 2024

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Mojave Basin Area Watermaster Service List as of May 22, 2024

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