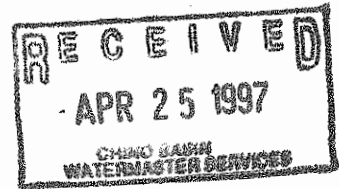


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10 FOR THE COUNTY OF SAN BERNARDINO

11 CHINO BASIN MUNICIPAL WATER)
12 DISTRICT,)
13)
14 Plaintiff,)
15)
16 v.)
17 CITY OF CHINO, et al.,)
18 Defendants.)

CASE NO. RCV 51010

OPPOSITION TO ADVISORY
COMMITTEE'S AND THE CITY OF
ONTARIO'S MOTION TO APPOINT
THE HONORABLE DON TURNER AS
INTERIM WATERMASTER

DATE: April 29, 1997
TIME: 1:30 p.m.
DEPT: H

SPECIALLY ASSIGNED TO THE
HONORABLE JUDGE J. MICHAEL
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I.

INTRODUCTION

Recognizing that its Motion to Appoint Retired Judge Turner as Interim watermaster is procedurally defective and substantively improper, the Advisory Committee has turned to familiar tactics of threats and intimidation. The Advisory Committee argues in its response to the court's Order to Show Cause Re: the Appointment of Ann Schneider as Referee that the court has no authority to appoint a referee in this matter. The Advisory Committee, as well as its controlling members, then offer to stipulate to the appointment of Ann Schneider, but only if the court grants their improper motion to replace Chino Basin Municipal Water District (CBMWD) as interim Watermaster with Retired Judge Don Turner.

The Advisory Committee's position can be considered as nothing less than an effort to gain leverage over this court. Only the court, however, should be surprised by this current conduct of the Advisory Committee. The Watermaster and the producers who have opposed the Advisory Committee's recent actions have had to endure this kind of conduct for years.

The Advisory Committee realizes that they risk a great deal with a thorough investigation of the respective powers of the Watermaster and the Advisory Committee and of the water quality and quantity management in the Chino Basin. Realizing that a change in the status quo and the elimination of CBMWD will undermine this investigation, the Advisory Committee now seeks the appointment of Retired Judge Turner as interim Watermaster.

The simple fact is that the court does have the power to appoint Ann Schneider as referee, and it is only through a thorough investigation by a person knowledgeable with regard to water issues, as well as knowledgeable with regard to the Judgment, can the court

1 issue a just order which considers the interest of all parties affected by water quantity and
2 quality management of the Chino Basin. During this investigation, status quo must be
3 maintained in order to ensure that such an investigation is objective.

4
5 **II.**

6 **MONTE VISTA WATER DISTRICT INCORPORATES BY REFERENCE IN THIS**
7 **OPPOSITION ALL ARGUMENTS IT HAS MADE IN ITS MOTION TO STRIKE**
8 **THE ADVISORY COMMITTEE'S AND CITY OF ONTARIO'S MOTION TO**
9 **APPOINT RETIRED JUDGE TURNER AS INTERIM WATERMASTER**

10 Monte Vista Water District has already filed a Motion to Strike the Motion by the
11 Advisory Committee and the City of Ontario for the appointment of Retired Judge Don
12 Turner as interim Watermaster. Rather than reiterate in detail all of those arguments in
13 this opposition, Monte Vista Water District requests that they be incorporated by reference.
14 To refresh the court's memory of those arguments, however, they will be summarized below.

15
16 The Court's Order to Show Cause of March 19, 1997, clearly limited the issues to be
17 considered by the Court at this time. Those issues did not include consideration of a motion
18 to appoint a new interim Watermaster. In fact, included with the court's Order to Show
19 Cause was an order by the court that CBMWD would continue to serve as interim
20 Watermaster.

21
22 Both the City of Ontario, one of the moving parties in this motion, and the
23 Department of Corrections have previously requested that the court appoint Retired Judge
24 Turner as interim Watermaster. On March 11, 1997, during the hearing on the appointment
25 of a nine-member panel as Watermaster, the court spent well over twenty minutes listening
26 to arguments for the appointment of Retired Judge Turner as interim Watermaster. These
27 arguments included discussions of PERS, tension between watermaster services staff and the
28

1 Watermaster, fears by the watermaster's services staff of retaliation by the current
2 Watermaster, and personnel actions to be taken regarding watermaster services staff. The
3 court denied the request for the appointment of Retired Judge Turner as interim
4 Watermaster, and noted that the appropriate remedy for these concerns was to include in
5 its order a provision requiring all parties to hold in abeyance personnel actions concerning
6 watermaster services staff. Consequently, the current motion by the Advisory Committee
7 and the City of Ontario is an improper motion for reconsideration, as it fails to present new
8 or different facts, circumstances or law than that existing at the time that the court made
9 its initial ruling. (Code.Civ.Proc.§1008; see also Gilbert v. AC Transit (1995) 32
10 Cal.App.4th.1494,1499.)
11

12
13 Additionally, the appointment of Retired Judge Turner will only serve to unduly
14 influence any referee appointed to investigate, and will further confuse the issues before this
15 court. As this court is fully aware, prior to his retirement, Retired Judge Turner was
16 assigned this matter and issued at least one ruling with regard to issues of water quality and
17 quantity management in the Basin. In fact, one of Judge Turner's written rulings will be the
18 subject of interpretation by the referee. It is wholly inappropriate in this context to appoint
19 Retired Judge Turner to serve as interim Watermaster where he will have an opportunity
20 to provide his own interpretation of a ruling he made eight years ago.¹
21

22 More importantly, the Advisory Committee has eliminated any objectivity on the part
23 of Retired Judge Turner. Both members of the Advisory Committee and Watermaster
24 services staff have improperly contacted Retired Judge Turner and likely provided him with
25

26 ¹ It is important to note that any interpretation Judge
27 Turner as interim Watermaster would give at this time would be
28 biased. Specifically, the Advisory Committee clearly sees
Retired Judge Turner in his role as interim Watermaster an
advocate for Watermaster services staff and the Advisory
Committee.

1 their position in regard to the current disputes. After such ex parte communications, no one
2 could be impartial, neutral or objective.

3 Finally, it is completely impractical to appoint Retired Judge Turner as interim
4 Watermaster. Retired Judge Turner does not have employees who can perform the
5 administrative functions of Watermaster. Clearly, one man cannot do this alone.
6

7 Obviously, the Advisory Committee envisions employees of CBMWD being
8 transferred to become employees of Retired Judge Turner. It is unclear as to whether
9 anyone has discussed with Retired Judge Turner his willingness to accept liability either as
10 an employer or as interim Watermaster. As Watermaster, Retired Judge Turner will be
11 responsible for assessing and collecting fees from producers, and investing those fees.
12 Retired Judge Turner will be a fiduciary and all liability which attaches to a fiduciary will
13 attach to him. He will not have the limited exposure that comes with being a public entity
14 under the Government Code.
15

16 III.

17 THE ADVISORY COMMITTEE HAS FAILED TO FOLLOW THE JUDGMENT
18 AND ITS OWN RULES IN BRINGING THIS MOTION

19 One argument the Advisory Committee has made time and time again in support of
20 its motion to disallow the audit expenses incurred by the Watermaster is that the
21 Watermaster failed to give proper notice before approving such an audit. It is,
22 consequently, amazing that the Advisory Committee would be guilty of the very same
23 infraction of the Judgment and rules that it previously asserted against the Watermaster.
24

25 As noted in the Agricultural Pool's Joinder, in the Advisory Committee's haste to
26 bring its motion to appoint Retired Judge Turner as interim Watermaster, it failed to give
27 notice to all of its members of the meeting to approve bringing the motion. Rather, it
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appears that it only gave notice to those members it believe would approve such a motion. Consequently, it is not surprising that 91.43% of the producers who attended the Advisory Committee's improperly noticed meeting approved this motion.

This argument, alone, is a sufficient basis to deny the Advisory Committee's current motion to appoint Retired Judge Turner as interim Watermaster. To rule otherwise would be to hold the Watermaster to a different standard than the standard to which the Advisory Committee is held.

IV.

THIS COURT SHOULD NOT CAPITULATE TO THE LEVERAGE ASSERTED BY THE ADVISORY COMMITTEE WITH REGARD TO THE APPOINTMENT OF ANN SCHNEIDER AS REFEREE

The Advisory Committee argues in response to the Court's Order to Show Cause that this court has no authority to appoint a referee to provide recommendations to it absent specific statutory authority. The court has relied upon Code of Civil Procedure Section 639 for that authority. The Advisory Committee, however, notes that while it is appropriate under Section 639 to appoint a referee to investigate all matters, factual and legal, when the matter is a "special proceeding", a referee may only be appointed to provide recommendations to the court on questions of fact if the matter is considered an "action."

Relying upon Tidewater Assoc.Oil Co. v. Superior Court (1955) 43 Cal.2d 815, 822-823, Agricultural Labor Relations Bd. v. Superior Court (1983) 149 Cal.App.3d 709, 714-715, and Agricultural Labor Relations Bd. v. Tex-Cal Land Management Co.,Inc. (1987) 43 Cal.3d 696, 707-709, the Advisory Committee asserts that the adjudication of the Chino Basin is an "action." As the court is seeking a reference with regard to the interpretation

1 of the judgment, the Advisory Committee asserts that this is an issue of law and, thus, under
2 Section 639 reference is not permitted.

3 The Advisory Committee's arguments, at best, are disingenuous. As noted in the
4 court's decision in Agricultural Labor Relations Bd. v. Tex-Cal Land Management Co., Inc.
5 (1987) 43 Cal.3d. 696, 797, to determine whether a matter is an "action" or a "special
6 proceeding", one needs to look at the definition set forth in Code of Civil Procedure
7 Sections 22 and 23. (see Tidewater Assoc. Oil Co. v. Superior Court (1955) 43 Cal.2d 815,
8 821.)
9

10 Section 22 defines an action as:

11 An ordinary proceeding in a court of justice by
12 which one party prosecutes another for the
13 declaration, enforcement, or protection of a right,
14 the redress or prevention of a wrong, or the
15 punishment of a public offense. (Code
Civ.Proc.§22)

16 Section 23 notes that every other remedy is a special proceeding. Thus, as noted by
17 the Court of Appeals in Agricultural Labor Relations Bd. v. Superior Court (1983) 149
18 Cal.App. 3d 709, the key to distinguishing between an action and a special proceeding is the
19 "remedy sought," rather than the underlying rights involved. (at 716.)
20

21 As noted in Witkin:

22 The two chief characteristics of special
23 proceedings are: (1) They are established by
24 statute and (2) the statutes usually (though not
25 invariably) create new remedies unknown to the
26 common law or equity courts. (Witkin,
27 Cal.Proc.(4th ed. 1987) actions, §13 p.66, citing
Gillette v. Gillette (1932) 122 Cal.App.640, 643;
Carpenter v. Specific Mun.Life Ins.Co. (1937) 10
28 Cal.2d 307, 327.)

1 Contrary to the assertions by the Advisory Committee in their response to the Order
2 to Show Cause, in determining whether the matters currently before the court is an "action"
3 or a "special proceeding", one does not look at the original complaint or the remedy sought
4 in that complaint. Rather, one looks at the Judgment, because the Judgment is now the
5 operative pleading in this matter.
6

7 The Judgment recognizes itself as a physical solution. (see Judgment, ¶4(d) and (l).)
8 This is consistent with every treatise discussing this case, which all note that this Judgment
9 is a physical solution and not a normal case in law or equity. (see Littleworth & Garner,
10 California Water (1995) p.188.)
11

12 A physical solution is a "common sense approach to water rights litigation" (Rogers
13 & Nicholas, Water for California (1967) §404, p.548). It is different than equitable
14 apportionment as it does not aim at reducing water rights, but seeks to satisfy the reasonable
15 needs of the users through a manipulation of the water supply or through other reasonable
16 measures. (Littleworth & Garner, California Water (1995) p.176). The remedy of physical
17 solution is a creation of the 1928 amendment to the California Constitution, now known as
18 Article X, Section 2. (Id)
19

20 By definition, with a physical solution no party is prosecuting another for the
21 declaration, enforcement or protection of a right, the redress or prevention of a wrong or
22 the punishment of a public offense. In fact, a physical solution is similar to the matter
23 before the court in Carpenter v. Pacific Mutual Life Ins.Co. (1937) 10 Cal.2d 307.
24

25 In Carpenter, the State Insurance Commissioner petitioned the Superior Court for
26 an order affirming a plan for the rehabilitation of an insolvent insurance company. In
27 holding that this was a special proceeding and not an action, the California Supreme Court
28 pointed out that the Commissioner was not prosecuting another party for the "declaration,

1 enforcement or protection of a right, the redress or prevention of a wrong, or the
2 punishment of a public offense." The court noted that it was not a proceeding in which one
3 "single party is prosecuting another party at all." (Id. at 327)

4 Similarly, in a physical solution, one single party is not prosecuting another party.
5 Rather, as in Carpenter, the parties are essentially seeking to rehabilitate a water system.
6 Given the above, under Code of Civil Procedure Sections 22 and 23, it is clear that a
7 physical solution is a special proceeding. Thus, a reference is appropriate even on issues of
8 law.
9

10 It should be no surprise, given the above, that the Water Code recognizes the
11 appropriateness of a reference in a matter involving a physical solution. Water Code §2001
12 specifically allows any court to refer a matter involving the determination of rights to water
13 to the State Water Resources Control Board for investigation and report.
14

15 Finally, both the doctrines of Waiver and Res Judicata preclude the Advisory
16 Committee from now challenging the reference to Ann Schneider. In 1994, the court on
17 its own motion ordered a reference to Ann Schneider regarding issues before it. ² The
18 matter involved a determination as to whether the Judgment permitted an overlying
19 landowner to "reserve" and/or "except" its decreed water rights from a transfer of a portion
20 of its overlying land. There is no question that this involved an interpretation of the
21 Judgment. If the Advisory Committee considers interpretations of the Judgment a matter
22 of law now, it must concede that an interpretation of the Judgment was a matter of law
23 then.
24
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27 ² In fact, this reference was noted in the Advisory
28 Committee's Reply which was filed by the law firm of Nossaman,
Guthner, Knox and Elliott. Additionally, portions of the
referee's recommendations were attached to that Reply.

1 The parties actively involved in this previous reference to Ann Schneider were Kaiser,
2 California Steel Industries, Inc., the Watermaster, the Advisory Committee and the
3 Appropriative Pool. Additionally, all parties were given notice of the court's intention to
4 appoint Ann Schneider as Special Referee. No one objected or opposed that appointment.
5 Consequently, those parties have now waived any objection to a subsequent appointment of
6 Ann Schneider as referee. Additionally, the doctrine of Res Judicata precludes those parties
7 from now challenging the appointment of Ann Schneider.
8

9 X

10 CONCLUSION

11 It is imperative that before the court enters a ruling upon the issues before it, a
12 thorough and complete analysis of the respective roles of the Watermaster and the Advisory
13 Committee is conducted, and a thorough investigation of the water quantity and quality of
14 the Chino Basin is completed. It is doubtful that this court, or for that matter any court in
15 Southern California, would have the sufficient time and resources to conduct such an
16 investigation. Therefore, the appointment of a referee, especially one without any biases
17 that would come with residing in the same county, is the logical solution.
18


19 It is equally imperative that the court maintain the status quo until the referee has
20 an opportunity to complete and file her recommendations. The appointment of a new
21 interim Watermaster, no matter who it is, will disrupt this status quo. Furthermore, when
22 the proposed new interim Watermaster is a retired judge who, in the past had this matter
23 before him, confusion is guaranteed with such an appointment.
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Monte Vista Water District is confident that Retired Judge Turner will make every effort to be objective, impartial, and neutral. Given, however, the efforts by the Advisory Committee and watermaster services staff to influence Retired Judge Turner even before his appointment, it is difficult to believe that any person could remain impartial.

DATE: April __, 1997

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is: 695 Town Center Drive, Suite 1400, Costa Mesa, California 92626-1924.

On April 24, 1997, I served the foregoing document described as MONTE VISTA WATER DISTRICT'S OPPOSITION TO ADVISORY COMMITTEE'S AND THE CITY OF ONTARIO'S MOTION TO APPOINT THE HONORABLE DON TURNER AS INTERIM WATERMASTER on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

/X/ BY MAIL:

/X/ As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Costa Mesa, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on April 24, 1997, at Costa Mesa, California.

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


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