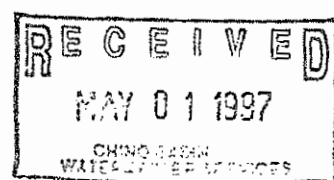


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10 CONSOLIDATED SUPERIOR/MUNICIPAL COURTS
11 COUNTY OF SAN BERNARDINO
12 WEST DISTRICT

12 CHINO BASIN MUNICIPAL WATER)
13 DISTRICT,)

14 Plaintiff,)

15 v.)

16 CITY OF CHINO, et al.,)

17 Defendants.)
18)

Case No. RCV 51010
[Specially Assigned to the
Honorable J. Michael Gunn]
NOTICE OF RULING
Date: April 29, 1997
Time: 1:30 p.m.
Dept: H

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APR 29 1997

Wanda DeVinney

SUPERIOR AND MUNICIPAL COURT
STATE OF CALIFORNIA, COUNTY OF SAN BERNARDINO

CHINO BASIN MUNICIPAL WATER
DISTRICT,

Plaintiff

v.

CITY OF CHINO, et al

Defendant

NO. RCV 51010

RULING AND ORDER
OF SPECIAL REFERENCE

RULING

This is an adjudication of groundwater and storage rights in the Chino Basin. Judgment was entered on January 2, 1978. Under the express terms of the Judgment¹ jurisdiction is reserved to the Court to modify, amend, amplify or enforce the provisions contained therein. (Judgment ¶ 15.) The following motions are currently before the court: (1) Motion for Order that Audit Commissioned by Watermaster is not a Watermaster Expense; (2) Motion to Appoint Nine-Member Watermaster Board; (3) Motion to Disqualify Counsel for Watermaster; (4) Motion for Appointment of Interim Watermaster; and (5) Motion to Strike the Motion for Appointment of Interim Watermaster. The parties have also been ordered to show

¹ A bound copy of the Judgment is in the current file; on its own motion the Court takes judicial notice of the Judgment.

1 cause why the Court should not appoint a Special Referee to assist in the resolution of the
2 Motion to Appoint Nine-Member Watermaster Board.

3
4 MOTION FOR ORDER THAT AUDIT COMMISSIONED
5 BY WATERMASTER IS NOT A WATERMASTER EXPENSE
6

7 Background of Audit Dispute

8 Chino Basin Municipal Water District ("the District") has served as Watermaster
9 since entry of judgment in 1978. In December of last year, it discovered that fraudulent checks
10 had been drawn upon Watermaster's account. Watermaster immediately informed the bank and
11 law enforcement authorities; the sums were restored by the bank and a new checking account
12 has been established.

13 The information was brought to the attention of the Advisory Committee, which
14 put the matter on the agenda for its meeting on January 8, 1997. The Advisory Committee was
15 informed by a representative of the San Bernardino County Sheriff's Department that fraudulent
16 activity of this type was not uncommon. The Advisory Committee was also informed that this
17 activity could occur even if proper procedures were in place. The Advisory Committee took the
18 following actions:

19 1. By a 91.43% majority vote it established an Ad Hoc Finance Committee
20 to examine the financial procedures of Watermaster. The Advisory Committee
21 further stated that if the Committee determines an independent audit is necessary,
22 the Advisory Committee would consider that recommendation.

23 2. It directed a recently formed Executive Committee (which consists of
24 the chairman of each of the three Pools) to attend the special Watermaster meeting
25 that had been called for the next day, January 9, to recommend that the
26 Watermaster Board not take any action on its agenda items, including the
27 authorization of an independent audit. This motion was also approved by a
28 91.43% majority.

1 Committee contends that the Judgment imposes clear conditions on the exercise of any
2 Watermaster powers that have not been approved in advance by the Advisory Committee.
3 Paragraph 38(b) of the Judgment provides:

4 (b) Advisory Committee. The Advisory Committee shall have the duty to study,
5 and the power to recommend, review and act upon all discretionary
6 determinations made or to be made hereunder by Watermaster.

7 (1) * * * * *
8 (2) Committee Review. In the event Watermaster proposes to take any
9 discretionary action, other than approval or disapproval of a Pool Committee
10 action or recommendation properly transmitted, or execute any agreement not
11 theretofore within the scope of an Advisory Committee recommendation, notice
12 of such intended action shall be served on the Advisory Committee and its
13 members at least thirty (30) days before the Watermaster meeting at which such
14 action is finally authorized. (Judgment, ¶ 38(b), underline added.)

15 Watermaster contends that the commission of a special audit was a discretionary
16 act. Watermaster further contends that because the Advisory Committee voted by a greater than
17 80% vote to delay taking action on a special audit, the District was mandated to act consistently
18 with that vote. The District does not dispute that if the act was a discretionary determination,
19 30 days notice of the meeting or public hearing was required. The District contends, however,
20 that the hiring of an accounting firm to perform a special audit is not a discretionary
21 determination, but an administrative function that is exclusively within the District's powers as
22 Watermaster.

23 If the special audit was a discretionary determination approved by 80% of the
24 Advisory Committee, the Watermaster violated the procedures contained in the Judgment. The
25 Court is requested to penalize the District's alleged violation by ordering that the costs of the
26 Special Audit not be deemed a Watermaster. If the special audit was not a discretionary
27 determination, then the special audit was within the Watermaster's authority and the expense
28 is properly charged to a Watermaster.

Part VI of the Judgment relating with the Physical Solution, provides:

41. Watermaster, with the advice of the Advisory and Pool
Committees, is granted Discretionary powers in order to develop an
optimum basin management program for Chino Basin including both water
quantity and quality considerations. Withdrawals and supplemental water
replenishment of basin water, and the full utilization of the water resources
of Chino Basin, must be subject to procedures established by and
administered through Watermaster with the advice and assistance of the
Advisory and Pool Committees composed of the effective producers. Both

1 the quantity and quality of said water resources may thereby be preserved
2 and the beneficial utilization of the basin maximized. (Judgment, ¶ 41,
3 underline added.)

4 Employment of professionals by the Watermaster is discussed in paragraph 20 of
5 the Judgment:

6 20. Employment of Experts and Agents. Watermaster may employ
7 or retain such administrative engineering, geologic, accounting, legal or
8 other specialized personnel and consultants as may be deemed appropriate
9 in the carrying out of its powers and shall require appropriate bonds from
10 all officers and employees handling Watermaster funds. Watermaster shall
11 maintain records for purposes of allocation of costs of such services as
12 well as of all other expenses of Watermaster Administration as between the
13 several pools established by the Physical Solution. (Judgment, ¶ 20.)

14 Paragraph 48 of the Judgment provides that the Watermaster's report, which is
15 filed at the end of each year, must contain a certified audit of all assessments and expenditures.
16 The special audit in question here was not prepared in the "normal course of business" for the
17 annual audit. The question then is whether the decision to conduct a special audit is a
18 discretionary determination, as that term is used in paragraph 38(b) of the Judgment.

19 The Court is persuaded to postpone its decision on the Motion For Order That
20 Audit Commissioned By Watermaster Is Not A Watermaster Expense until a recommendation
21 has been received from a special referee, because a determination of this motion requires an
22 interpretation of the above-mentioned provisions of the Judgment for which the Court seeks
23 expert advice. Furthermore, the issue of whether or not the Advisory Committee may mandate
24 administrative tasks to the Watermaster has a direct relationship to the checks and balances
25 provided in the Judgment and, hence, will impact the decision on the Motion to Appoint a Nine-
26 Member Board as Watermaster.

27 MOTION TO APPOINT NINE-MEMBER BOARD

28 A motion has been filed by the Advisory Committee purportedly on behalf of the
Watermaster for an order relieving the District of all Watermaster duties and substituting a nine-
member board as Watermaster in its place. The motion is described by one group of producers

1 as a power struggle between the producers in the north end of the basin and the producers in the
2 south end of the basin. The motion has prompted Senator Ruben S. Ayala to file a declaration
3 with this court stating his vigorous opposition to a motion which would "replace an independent
4 Watermaster with individual producers whose self-interest would bias them against 'the
5 protection of the groundwater supplies for the Chino Basin for the public, health, safety and
6 welfare."²

7 Although there has been no evidentiary hearing where live testimony was taken,
8 it appears to the Court from the papers submitted in this matter that over the course of the past
9 few years the Advisory Committee has assumed the task of directing the performance of the
10 District's Chief Executive Officer, Traci Stewart, with respect to Watermaster functions. Until
11 several months ago, the District's board of directors acquiesced to the Advisory Committee's
12 assumption of Watermaster administrative duties. However, the District's recent actions in
13 calling for a special audit and terminating the services of Nossaman, Guthner, Knox & Elliott
14 ("Nossaman Firm") as Watermaster counsel demonstrate that the District is no longer willing
15 to acquiesce to the Advisory Committee with respect to its (the District's) employees and other
16 administrative matters.

17 It is the opinion of this Court that the resolution of the motion to appoint a nine-
18 member board as Watermaster will necessitate a thorough review of the checks and balances
19 contained in the 1978 Judgment and an interpretation of the phrase "discretionary
20 determinations" used in Paragraph 38(b) of the Judgment.

21 The Court finds that there is an urgent need to address the issues presented by the
22 motion, and that it is necessary to obtain a recommendation from a recognized water law expert
23 on the issues before it. Accordingly, the Court will order a special reference of this motion. The
24 Advisory Committee and its allies contend that the Court may not order a reference under Code

25
26 ²This declaration has been objected to as impermissible opinion evidence. The Court feels
27 that there exists sufficient foundation for qualifying Senator Ayala as an expert, and the
28 foundation will probably be required by the special referee as will be discussed further in this
opinion. For now, the issue is moot.

1 of Civil Procedure section 639, subdivision (d). The Court disagrees. *Tide Water Assoc. Oil*
2 *Co. v. Superior Court* (1955) 43 Cal.2d 815 is not authoritative for the proposition advanced by
3 the Advisory Committee. In *Tide Water* the issue presented for determination was whether or
4 not the trial court had jurisdiction over a cross-complaint filed by the defendant. The Court did
5 not consider Code of Civil Procedure section 639 subdivision (d).

6 Furthermore, Water Code section 2000³ provides that "In any suit brought in any
7 court of competent jurisdiction in this State for determination of rights to water, the court may
8 order a reference to the board [State Water Resources Control Board], as referee, of any or all
9 issues involved in the suit." Not only have constitutional challenges to this section been
10 unsuccessful, our Supreme Court has indicated a preference for such references.

11 "Every recent major water law decision of this court has expressly or impliedly
12 approved the reference procedure provided by section 24 [which preceded Water Code section
13 2000] and has recommended, in view of the complexity of the factual issues in water cases and
14 the great public interests involved, that the trial courts seek the aid of the expert advice and
15 assistance provided for in that section. [Citations.]" *City of Pasadena v. City of Alhambra* (1949)
16 33 Cal.2d 908, 917, underline added.)

17 The Court believes it has the authority to appoint Anne Schneider over the
18 objection of some of the parties. However, if an appellate court later determines that it is
19 without such authority, then the matter will be referred to the State Water Resources Control
20 Board pursuant to Water Code section 2000.

21 22 MOTION TO DISQUALIFY

23 The filing of the above two motions prompted the filing of a third motion, to
24 disqualify the law firm of Nossaman, Gunther, Knox & Elliott and attorneys John Ossiff and
25 Frederic A. Fudacz (collectively the Nossaman Firm) from representing *either* Watermaster or
26 the Advisory Committee.

27
28 _____
³Water Code section 2000 was preceded by Water Code section 24.

1 "A former client may seek to disqualify a former attorney from representing an
2 adverse party by showing the former attorney actually possesses confidential
3 information adverse to the former client. However, it is well settled actual
4 possession of confidential information need not be proved in order to disqualify
5 the former attorney. It is enough to show a 'substantial relationship' between the
6 former and current representation . [Citation.] If the former client can establish the
7 existence of a substantial relationship between representations, the courts will
8 conclusively presume the attorney possesses confidential information adverse to
9 the former client. [fn.] [Citations.]" *H.F. Ahmanson & Co. v. Salomon Brothers,*
10 *Inc.* (1991) 229 Cal. App. 3d 1445, 1452, underline added.)

11 The Court finds that the Nossaman Firm in the past represented the Advisory
12 Committee in this action and presently represents Watermaster in this action. It is apparent to
13 the Court that Watermaster is unwilling to waive the conflict presented by such dual
14 representation since the Nossaman Firm has been discharged by the District board -- the
15 Nossaman Firm no longer represents Watermaster.⁴

16 The Court is not persuaded that the current Services & Facilities Contract requires
17 a different result. Under the contract District Staff are directed to take direction from and report
18 to the Advisory Committee. The Nossaman Firm cannot be considered District Staff. As
19 counsel to Watermaster, the Nossaman Firm owed its allegiance to the District, not to the
20 Advisory Committee.

21 The motion to disqualify the Nossaman Firm from representing either Watermaster
22 or the Advisory Committee is GRANTED.

23
24 MOTION FOR APPOINTMENT OF INTERIM WATERMASTER
25 AND RELATED MOTION TO STRIKE

26
27 ⁴The retainer agreement was signed by the District board of directors in their official
28 Watermaster capacity. Therefore the District board has the authority to discharge the Nossaman
Firm.

1 The Advisory Committee and the City of Ontario move to have retired Judge Don
2 Turner appointed as interim watermaster, pending a recommendation from the special referee.
3 The appointment of Judge Turner would also require a modification of the Judgment to provide
4 for his compensation. The Advisory Committee and the City of Ontario contend that the
5 appointment of an interim watermaster is necessary because the relationship between the
6 Advisory Committee and the District has deteriorated to such a degree that very little is presently
7 being done to manage the Chino Basin Aquifer. Traci Stewart declares that all of the activities
8 necessary to disengage the "Watermaster Services Staff" from the District have occurred, with
9 the exception of the execution of final documents for a PERS contract and obtaining a separate
10 payroll service. Ms. Stewart further declares that the Watermaster Services Staff could be
11 completely separated from the District provided the District would cooperate.

12 Monte Vista Water District has filed a motion to strike the Advisory Committee's
13 motion for appointment of interim watermaster. Monte Vista contends the motion is an
14 improper reconsideration of an oral motion made by the State of California at the last court
15 hearing. Monte Vista further contends that the ex parte communication with Judge Turner was
16 improper. Monte Vista asserts that the Court's prior order directing the District to take no
17 personnel action with regard to Watermaster Services Staff is sufficient protection for the
18 employees assigned to Watermaster Services. Finally, Monte Vista contends that because Judge
19 Turner has already expressed a view as to the merits of certain issues before the Court, that he
20 is not qualified to act either as a referee or as Watermaster.

21 The Court is persuaded that an interim watermaster is necessary to resolve the
22 continuing deadlock between the Advisory Committee and the District. The Court hereby
23 appoints the California Department of Water Resources as Interim Watermaster subject to the
24 Department's acceptance and agreement on mutually acceptable terms. The Advisory
25 Committee and Chino Basin Municipal Water District are directed to jointly negotiate terms and
26 conditions and present them to the Court for approval no later than June 18, 1997. The
27 Department of Water Resources shall operate as Interim Watermaster until such time as the
28 Court has considered and acted upon the report of the special referee.

1 The Motion to Strike the Motion of an Interim Watermaster is DENIED. The
2 Court finds that the motion is not an improper motion for reconsideration.

3
4 **ORDER OF REFERENCE**

5 Pursuant to California Code of Civil Procedure section 639 subdivision (d) the
6 Court hereby makes this special reference for the purpose of receiving written recommendations
7 to the Court from the Special Referee, Schneider, regarding the facts and law relative to the
8 following matters after review of the file, judgment, pleadings, motions, memorandum of points
9 and authorities, exhibits, declarations, requests for judicial notice, any live testimony and such
10 other factual or legal matters including conducting such hearings thereon as may appear relevant
11 or necessary.

12 1. The Special Referee shall consider the Motion for Order that Audit Commissioned
13 by Watermaster is not a Watermaster Expense and make a recommendation as to how to proceed
14 with resolving the motion. The Special Referee is specifically requested to consider and give
15 an opinion on the meaning of Paragraph 38(b) of the Judgment and its relationship to Paragraph
16 41 of the Judgment.

17 2. The Special Referee shall consider the Motion to Appoint a Nine-Member
18 Watermaster Board and make a recommendation as to how to proceed with resolving the motion.
19 The Special Referee is specially requested to consider the checks and balances contained in the
20 1978 Judgment and to consider the advantages and disadvantages of a public entity watermaster
21 versus a private entity watermaster.
22

23
24 DATED: April 29, 1997.

25
26
27 
28 J. MICHAEL GUNN, JUDGE