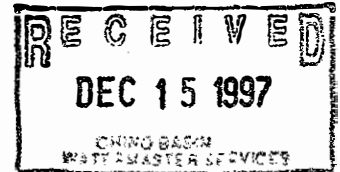


SCHNEIDER
RE APPT
COURT DOCS.

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 IN AND FOR THE COUNTY OF SAN BERNARDINO
3 WEST DISTRICT



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6 CHINO BASIN MUNICIPAL WATER DISTRICT,

7 Plaintiff

8 v.

9 CITY OF CHINO, et al.,

10 Defendants.
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Case No. RCV 51010
(Specially Assigned to the Honorable J.
Michael Gunn)

REPORT AND RECOMMENDATION
OF SPECIAL REFEREE TO COURT
REGARDING: (1) MOTION FOR
ORDER THAT AUDIT
COMMISSIONED BY
WATERMASTER IS NOT A
WATERMASTER EXPENSE, AND
(2) MOTION TO APPOINT A NINE-
MEMBER WATERMASTER BOARD

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2. Advisory Committee:

Notice of Motion and Motion for Appointment of Nine Member Board as Watermaster; Memorandum of Points and Authorities in Support Thereof; Declaration of Traci Stewart (filed with Court on 2/3/97) referenced as "Advisory Committee Brief 1"

3. Advisory Committee:

Notice of Motion and Motion for Order of Court that Audit Commissioned by the Chino Basin Municipal Water District Board is not a Watermaster Expense; Declaration of Traci Stewart (filed with Court on 1/28/97) referenced as "Advisory Committee Brief 2"

4. Chino Basin Municipal Water District:

Opposition to Motion for Order of Court that Audit Commissioned by the Chino Basin Municipal Water District Board is not a Watermaster Expense; Declarations of Larry Rudder, George Borba and Bill Hill in Support Thereof (filed with Court on 2/24/97) referenced as "CBMWD Brief 1"

5. Monte Vista Water District:

Referee's Requested Brief Regarding Identified Issues; Declaration of Langdon Wood Owen in Support of Monte Vista Water District's Brief (submitted to Special Referee on 8/18/97) referenced as "MVWD Brief 2"

6. Chino Basin Municipal Water District:

Memorandum of Points and Authorities re: Motion to Appoint Nine Member Watermaster Board (submitted to Special Referee on 8/18/97) referenced as "CBMWD Brief 3"

7. Jurupa Community Services District:

Jurupa Community Services District's Response to Special Referee Anne Schneider's July 18, 1997 Request for Briefs with respect to Specified Issues (submitted to Special Referee on 8/18/97) referenced as "Jurupa Brief"

¹Numerous briefs were prepared by the parties and filed with the Court or submitted to the Special Referee. Abbreviated references to these briefs are contained in the Written Report and Recommendation by the Special Referee. This index provides the complete titles of the referenced briefs.

8. Chino Basin Municipal Water District:

Opposition to Motion for Appointment of Nine Member Board as Watermaster; Memorandum of Points and Authorities in Support Thereof (filed with Court on 3/4/97) referenced as "CBMWD Brief 2"

9. Monte Vista Water District:

Memorandum of Points and Authorities of Monte Vista Water District in Partial Opposition to Chino Basin Watermaster's Motion for Appointment of Nine-Member Board as Watermaster; Declaration of P. Joseph Grindstaff (filed with Court on 3/5/97) referenced as "MVWD Brief 1"

1 **I. INTRODUCTION**

2 **A. Scope of Reference and Restatement of Issues**

3 On April 29, 1997, the Honorable J. Michael Gunn, pursuant to California Code of Civil
4 Procedure Section 639(d), ordered a special reference for the purpose of receiving written
5 recommendations from the appointed Special Referee, Anne J. Schneider, regarding the facts and law
6 relative to particular matters which had been raised by the parties to the January 2, 1978¹ Judgment
7 in the matter of *Chino Basin Municipal Water District v. City of Chino* (Case No. RCV 51010)
8 (Ruling and Order of Special Reference, April 29, 1997 [hereinafter "Order of Special Reference"]).
9 The special reference was made as a result of the following motions which remain before the Court:
10 (1) Motion for Order That Audit Commissioned by Watermaster Is Not a Watermaster Expense; and
11 (2) Motion to Appoint Nine-Member Watermaster Board. After reviewing the motions and
12 opposition thereto and conducting a hearing regarding the same, the Order of Special Reference
13 requests that the Special Referee address the following:

- 14 1. The Special Referee shall consider the Motion for Order that Audit
15 Commissioned by Watermaster is not a Watermaster expense and make a
16 recommendation as to how to proceed with resolving the motion. The Special
17 Referee is specifically requested to consider and give an opinion on the
18 meaning of Paragraph 38(b) of the Judgment and its relationship to Paragraph
19 41 of the Judgment.
20 2. The Special Referee shall consider the Motion to Appoint a Nine-Member
21 Watermaster Board and make a recommendation as to how to proceed with
22 resolving the motion. The Special Referee is specially requested to consider
23 the checks and balances contained in the 1978 Judgment and to consider the
24 advantages and disadvantages of a public entity watermaster versus a private
25 entity watermaster.

26 (Order of Special Reference at 10.)

27 The thrust of these issues is to question the roles of the Watermaster and the Advisory
28 Committee and how those roles are related to one another. The recommendations of the Special
29 Referee are intended to clarify each of the respective roles as well as the relationship between those
30 roles in order to give guidance for the future as well as to respond to the immediate motions brought

31 ¹The January 2, 1978 Judgment (hereinafter "Judgment") is an adjudication of groundwater
32 and storage rights in the Chino Basin and a bound copy of the Judgment is in the current file of the
33 Court, which has continuing jurisdiction over the Judgment.

1 before the Court.

2 **B. Report on Briefing and Hearing**

3 After receiving notice of the special reference the Special Referee conducted a conference call
4 to ascertain recommendations from the parties as to how to proceed. It was determined that
5 additional briefing was necessary and that a subsequent opportunity to be heard would be granted to
6 the parties in order to fully understand the issues presented. On July 18, 1997, the Special Referee
7 provided the parties with additional issues to be briefed and a briefing schedule. The parties
8 presented their initial briefs on August 18, 1997, and reply briefs on September 8, 1997. On October
9 21, 1997, a hearing was conducted at the office of the Watermaster staff, during which additional
10 questions were raised and discussed. Counsel for certain parties and the parties themselves had an
11 opportunity to fully discuss all issues raised during the October 21 hearing.² The original transcript
12 from this proceeding is hereby made a part of this recommendation and lodged with the Court.³

13 **C. Urgency of Resolution**

14 It has become apparent that the resolution of the motion to appoint a nine-member
15 Watermaster board must be resolved as expeditiously as possible. Chino Basin is suffering from both
16 overdraft and water quality issues that continue to remain unresolved as a result of conflicts between
17 the parties and the discrepancy of opinion with regard to the Watermaster's and the Advisory
18 Committee's roles. The Court has recognized the urgency of the issues presented by the motion to
19 appoint a new Watermaster (Order of Special Reference at 6) and the parties agree that the "process
20 has ground to a halt" (TR 136:25). The urgency appears to stem from the poor condition of the basin
21 itself, the inability of the Watermaster and the Advisory Committee to resolve essential issues, and
22 the inability of the Watermaster to move forward in light of the interim appointment of the California
23 Department of Water Resources (hereinafter "DWR"). Although the Court can resolve the issue with

24
25 ²On November 10, 1997, Special Referee received the Declaration of Gerald S. Thibeault,
26 Executive Officer of the Regional Water Quality Control Board, from counsel for Monte Vista Water
27 District. This declaration has not been considered by the Special Referee as the matter had been
28 submitted at the close of the October 21 hearing.

³All references to the transcript from the hearing conducted on October 21, 1997, shall be
"TR page:line."

1 regard to the appointment of a new Watermaster, the underlying issues as to the condition of the
2 basin and the proper roles of the Watermaster and Advisory Committee are not so easily resolved.
3 Extensive discussion, however, between the parties and the Special Referee occurred during the
4 October hearing regarding the respective roles of the Advisory Committee and Watermaster which
5 will be further explicated herein and which should assist further cooperative resolution of the
6 impending issues regarding Chino Basin management, as well as provide assistance to the Court as
7 the ultimate "check" on the parties.

8 **D. Brief Factual Background**

9 Since issuance of the Judgment in 1978, the Chino Basin Municipal Water District (hereinafter
10 "CBMWD") has been the Watermaster for the Chino Basin. Over the past few years it appears that
11 the Advisory Committee has assumed the task of directing the performance of the Director of
12 Watermaster services, currently Traci Stewart, with respect to Watermaster functions. (Order of
13 Special Reference at 6. *See also* Advisory Committee Brief 1 at 1-2, CBMWD Brief 2 at 2, MVWD
14 Brief 2 at 2.) Mr. Markman, spokesman for the moving parties, explained:

15 . . . the advisory committee and the watermaster entered into an agreement, as you
16 know, the famous facilities and services agreement which essentially delegated over
17 to the advisory committee supervision of the staff to do all this stuff. And that
18 operated that way for a while. Then we had staff operating under direction of the
19 advisory committee by contract, and we had a lawyer . . . in the middle trying to work
20 with the staff directed by the advisory committee but still theoretically under the
21 direction of Chino Basin Municipal Water District, all of which created chaos.

19 (TR at 42:19 to 43:5.)

20 In December 1996, CBMWD discovered fraudulent checks had been drawn upon the
21 Watermaster's account. (Order of Special Reference at 2.) By that time, it appeared there was no
22 longer any cooperation between the Advisory Committee and the Watermaster. Additional concerns
23 were expressed regarding Watermaster expenditures which had been directed by the Advisory
24 Committee and reluctantly processed by CBMWD as the Watermaster. (City of Ontario Brief, Decl.
25 of T. Stewart and M. Lauffer.) Accordingly, CBMWD requested a special audit be conducted, which
26 the Advisory Committee refused to approve.

27 The parties appear to agree that there have been no significant disputes between the
28 Watermaster and the Advisory Committee until recently. (TR at 126:12 to 133:6.) When a dispute

1 arose as to whether a special audit should be conducted or not, the Advisory Committee was acting
2 as the *de facto* Watermaster. Subsequently, when at CBMWD's and others' request the Watermaster
3 staff had a special audit conducted, the Advisory Committee brought a motion as the *de facto*
4 Watermaster seeking Court determination that the special audit was not a proper Watermaster
5 expense. At the same time, the Advisory Committee sought a Court order changing the Watermaster.

6 One hearing participant (Mr. Teal, City of Ontario) described the historical relationship of
7 the Advisory Committee and Watermaster up until the issue of replacing the Watermaster arose:

8 I've been involved in this process since 1978 and beyond, and one of the things that
9 needs to be recognized is that throughout the 18 years prior to 1996, the pools and
10 the advisory committee essentially, on 98 percent or more of the actions, have been
11 a hundred percent consensus. . . . And one of the reasons why we were able to reach
12 consensus . . . was that we were very intimately involved in protecting each other's
13 interests. . . . We were very careful in protecting everyone's interest, mainly because
14 we all had a fear that if we didn't, then this adjudication would not work, that we
15 would be back in court. And everybody had a fear that suddenly this Pandora's box
16 would be opened again. And none of us wanted that because we all had something
17 to lose. . . . What has stalled the [Optimum Basin Management Program] process, of
18 course, is we all got hung up on who the new watermaster was going to be. Well, for
19 18 years basically the watermaster functioned as the advisory group, and we did it
20 through consensus building because, again, we were all afraid that the judgment
21 wouldn't work if we didn't build a consensus.

16 (TR at 126:12 to 129:6.)

17 The parties appear to concur that the only time the Watermaster has disagreed with a
18 recommendation of the Advisory Committee has lead to the current motion to appoint a new
19 Watermaster. (TR at 64:4 to 67:20.) The underlying issue that triggered the current motion appears
20 to have been the participation of the Watermaster in the question of payment for the groundwater put
21 through a "desalter" facility.⁴ Mr. Kidman, the spokesperson for the opposing parties, stated:

22 There was a proposal by one member of the watermaster board at that time, Chino
23 Basin Municipal Water District, that said that they would support moving forward
24 with that, allowing that production [of groundwater to be run through the desalter]
25 to take place without assessment under the watermaster. It was that attempt at

25 ⁴It seems the motion to elect a nine-member board Watermaster stems from the Watermaster
26 not agreeing with the Advisory Committee with regard to the special audit. The parties have
27 indicated the initialization of the special audit triggered the filing of the motion to change the
28 Watermaster. However, the first motion to change the Watermaster stemmed from the desalter
project, as explained. That initial motion was a request to have the Advisory Committee act as the
Watermaster.

1 independence that brought this whole house of cards down around all of us.

2 (TR at 66:13-19.) Mr. Markman, spokesperson for the moving parties, concurred, stating: "I agree
3 that frames the issue perfectly." (TR at 66:21-22.) Mr. Grindstaff, Monte Vista Water District,
4 added further detail:

5 The entire reason we're sitting here today is because during the process of getting
6 water for the desalter, . . . one of the members of the watermaster board came to a
7 meeting of the ag pool and said, If we can't get water for this desalter, then I want to
8 work with you in the ag pool, and we're going to have enough votes so it won't be
9 a mandated action. . . That was the major issue, in fact, when the first motion was
made to replace watermaster was that someone from watermaster had the nerve to
actually come into the basin and say we're going to take an action or we're going to
work with somebody to take an action that might be opposed by a majority of the
advisory committee.

10 (TR at 64:18 to 65:7.)

11 The remarkable placidity of the Watermaster over the 18-year period from 1978 to 1996, appears in
12 large part to be attributable to the fact that there have been extensive negotiations to achieve
13 consensus on issues. (TR at 126:12 to 127:16.) It may also not have been clearly understood that
14 the Watermaster can disagree with either mandatory or other recommendations of the Advisory
15 Committee.⁵

16 In an attempt to resolve the continuing deadlock between the Advisory Committee and the
17 CBMWD and to obtain additional time for the special reference, the Court appointed DWR as interim
18 Watermaster "subject to the [DWR's] acceptance and agreement on mutually acceptable terms."
19 (Order of Special Reference at 9.) Further, the Court ordered the Advisory Committee and CBMWD
20 to jointly negotiate terms and conditions and present them for approval to the Court no later than
21 June 18, 1997. (*Id.*) DWR was to act as interim Watermaster until the Court had acted upon the
22 report of the Special Referee. The parties have not been able to come to a resolution with regard to
23 the interim appointment of DWR. (TR at 14:4-11.) The negotiation process with DWR continues,

24
25 ⁵It is unclear from the record how much influence legal counsel's advice had. The advice to
26 the Watermaster from legal counsel (which has since been recused) was that the Watermaster had no
27 recourse if the Advisory Committee acted by 80% vote. (CBMWD Brief 1, Decl. of L. Rudder ¶¶ 6
28 and 10.) It seems legal counsel at that time specifically indicated to Watermaster services staff that
an 80% or greater vote by the Advisory Committee was a mandate and there was no advice that such
a mandate could be appealed to the Court pursuant to the Judgment. (*Id.*)

1 but with no certainty that it will be finalized. (TR at 17-18.) In the meantime, CBMWD continues
2 to be recognized as an interim Watermaster (TR at 14), notwithstanding the fact that essentially all
3 Watermaster functions currently appear to be under Advisory Committee control.

4 The Advisory Committee (as the *de facto* Watermaster), in February 1997, brought its motion
5 to remove CBMWD as Watermaster and replace CBMWD with a nine-member Watermaster board.
6 The Judgment provides for particular procedures in the event the Advisory Committee or another
7 party wishes to replace the Watermaster. The procedural requirements have been met by the
8 Advisory Committee. (Advisory Committee Brief 1.) In addition, the Advisory Committee sought
9 an order from the Court declaring the special audit conducted by CBMWD was not a proper
10 Watermaster expense. (Advisory Committee Brief 2.)

11 II. COMPELLING REASON ANALYSIS

12 A. The Court is Required to Make a New Watermaster Appointment Upon Motion 13 Supported by a Majority of the Advisory Committee Unless "There is a 14 Compelling Reason to the Contrary"

14 The Judgment is clear with regard to the process by which the Watermaster may be replaced.

15 The Judgment provides as follows:

16 Watermaster may be changed at any time by subsequent order of the court, on its own
17 motion, or on the motion of any party after notice and hearing. Unless there are
18 compelling reasons to the contrary, the court shall act in conformance with a motion
19 requesting the Watermaster be changed if such motion is supported by a majority of
20 the voting power of the Advisory Committee.

19 (Judgment at ¶ 16, emphasis added.) In light of the fact that all parties agree the Advisory Committee
20 has moved the Court to replace the Watermaster with a majority vote, the inquiry is limited to
21 whether there is "compelling reason to the contrary." During the subsequent briefing requested by
22 the Special Referee as well as the hearing conducted in October, the parties opposed to the
23 appointment of the nine-member board as Watermaster provided the following reasons as bases for
24 denying the motion to appoint the nine-member board:

25 1. The purpose and objective of the Judgment overrides all other considerations (citing
26 Judgment ¶¶ 15-17, 39-41) and the replacement nine-member board undermines the purpose and
27 objective of the Judgment itself. The purpose and objective of the Judgment is basin management.
28 (MVWD Brief 2 at 6.) A "producer panel" Watermaster would violate the structure of the Judgment

1 as it has always been the intention of all parties that the Watermaster be independent, neutral, and
2 objective. (MVWD Brief 2 at 7-8 and Decl. of L. Owen.)

3 2. Appointing the basin producers as the Watermaster eliminates the “checks and
4 balances” between Watermaster and the Advisory and Pool Committees. (MVWD Brief at 7.)

5 3. The Judgment does not contemplate a Watermaster consisting of more than one public
6 or private entity. There would be a morass of bureaucracy if numerous entities, consisting of
7 numerous boards of directors, had to coordinate their voting and meetings to act effectively
8 (especially to run the day-to-day business). (MVWD Brief 2 at 8.)

9 4. The most compelling reason to deny the motion is the present condition of the
10 groundwater of the Chino Basin. (CBMWD Brief 3 at 2, Decl. of J. Grindstaff.) The present
11 condition of Chino Basin is “deplorable.” (*Id.*)

12 5. The purpose of vesting Watermaster with the discretionary power to develop the
13 fundamentally important program (the Optimum Basin Management Program for Chino Basin) with
14 only the advice of the Advisory Committee was to promote objectivity and avoid the inherent self-
15 interest and bias of the Advisory Committee members. (Jurupa Brief at 3.) A Watermaster board
16 controlled by northern basin interests who have unimpaired water quality compared to southern basin
17 entities whose water quality is impaired will create self interest and bias in implementing Article X,
18 Section 2 of the California Constitution. (Jurupa Brief at 5.)

19 6. There is evidence of a pattern of mismanagement policies and procedures for
20 expenditures not being followed by the Watermaster, the basin being overdrawn and the quality of
21 the water greatly diminished. (CBMWD Brief 2 at 3-4; *see also* Order of Special Reference.)

22 The term “compelling reasons” must be interpreted based upon the understanding and intent
23 of the Court and not that of the parties. (Russell v. Superior Court (1957) 252 Cal.App.2d 1, 8.)
24 Implied in such a requirement that “compelling reasons” be established is that the Court find reasons
25 which “force” or “compel” the Court to deny the motion based on the ordinary and popular sense of
26 the term.

27 ////

28 ////

1 **B. The Most Compelling Reason Not to Appoint the Nine-Member Board as**
2 **Watermaster Asserted by Parties Opposing the Motion is that the Advisory**
3 **Committee Would Control the Watermaster and the Watermaster will not**
4 **Carry Out the Separate Functions Given to it Under the Judgment**

5 Parties opposing the appointment of a nine-member Watermaster board rely heavily on the
6 proposition that the Judgment provides for inherent “checks and balances” between the Advisory
7 Committee and the Watermaster which would be eliminated by the appointment of the suggested
8 nine-member Watermaster board. As stated during the hearing, the question is whether “the tyranny
9 of the majority govern[s] under this judgment, or is it necessary that under those areas that are clearly
10 discretionary — is it necessary to have some independent checks and balances?” (TR at 78:14-18.)
11 The implicit question is whether appointment of the nine-member board will allow the Advisory
12 Committee to continue to govern the Chino Basin.

13 Six members of the nine-member board would be three appropriative pool members and three
14 overlying pool members, two from the overlying (agricultural) pool and one from the overlying
15 (nonagricultural) pool. (TR at 87:22-25.) The other three seats are proposed for nonpumper water
16 districts (CBMWD, Western Municipal Water District, and Three Valleys Municipal Water District).

17 The parties in opposition to the motion contend the nine-member board would not be
18 independent and that the producer majority cannot be expected to administer the Judgment
19 objectively, since they have financial interests in producing water as inexpensively as possible from
20 the basin. (TR at 139:23 to 141:4.) Alternative vote-counting was suggested, however: Producers
21 who draw water from the northern portion of the basin will have three votes on the proposed nine-
22 member board and those three votes could well combine with the votes of the one member from the
23 overlying (nonagricultural) pool, the one member from Three Valleys Municipal Water District, and
24 the one member from Western Municipal Water District. Therefore, an alternative majority was also
25 postulated which would be able to control the proposed nine-member board.⁶ (TR 87:22 to 88:14.)

26 ⁶Mr. Kidman suggested a further consideration that could affect voting patterns of the nine-
27 member board, one that could at some point precipitate the need for modification of the Judgment:

28 One of the problems in the judgment . . . is that there is a strong tendency for the rich

(continued...)

1 The parties opposed to the appointment of the nine-member board do not provide direct
2 evidence that the nine-member board will fail to be independent of the Advisory Committee.
3 Although they assert that the nine-member board would not disagree with the Advisory Committee,
4 that there would be “a natural tendency for the producer members of the Watermaster committee to
5 follow the directions and the positions of those who appoint them and those who they represent” (TR
6 at 90:12-15), it was conceded that it was conceivable that the nine-member board configuration
7 would disagree with the Advisory Committee. (TR at 90:19-22.) In fact, it was also suggested that
8 the inclusion of two more nonproducer public agencies (Western Municipal and Three Valleys
9 Municipal Water Districts), along with CBMWD, will improve the current situation (TR at 85:9-17)
10 and that these public agencies provide protections from minority views. It was also suggested that
11 these three public agencies are in the best position to seek assistance from the Court. (TR at 86:10-
12 17.)

13 Overall, because there is no evidence with regard to how the nine-member board would vote
14 and whether their pecuniary interests would control their voting, there is no evidence to indicate that
15 any “checks and balances” of the Judgment would be compromised by the nine-member board
16 Watermaster. The parties seem to agree that the best way to ensure that the essential function of the
17 Watermaster will be carried out was not so much dependent on who the Watermaster may be as on
18

19 ⁶(...continued)

20 to get richer and the poor to get poorer. That is, representation on the advisory
21 committee and so on gets to be established according to . . . how many water rights
22 a party holds and to how much water a party produces or overproduces. And it's that
23 second part especially that allows the rich to get richer and the poor to get poorer
24 because those entities that are in a part of the basin where they can't produce because
25 water quality is not suitable get fewer votes as a result and those that happen to be in
26 a sweet part of the basin, where they can even overproduce their water right if they
27 wanted to and take advantage of the underproduction of the others, get more votes.
The system gets stacked against the parties that are in the lower-quality part of the
basin. And appointing a watermaster panel that's composed of a majority, numerical
majority, of producers, given the way the voting rights are stacked, is hardly a
solution . . . that gives some people, who would like to see cleanup occur, confidence
that it will.

28 (TR at 141:22 to 142:18.)

1 additional court oversight and guidance. Mr. Kidman, representing opposing parties, stated:

2 Could it work? Possibly. You asked that. I think so. It could work. The best way
3 to make sure it worked is to make sure that we have an order that does outline what
4 the really essential functions of the watermaster will be and specifically charges
5 whoever is appointed to carry them out and establishes report-back procedures,
6 opportunities where those that may disagree that everything is just fine have the ability
7 to come in and . . . make sure their position is heard as to whether or not everything
8 is going just fine.

6 (TR at 141:11-21.)

7 Finally, opposing parties did not provide an alternative at the hearing.⁷ (TR at 139:16 to
8 141:21.) Given the proposed composition of the nine-member board and the concerns raised by
9 parties in opposition to the appointment, it seems prudent and necessary to provide a gauge upon
10 which this Court can determine whether the nine-member board is properly carrying out its
11 Watermaster roles in the event the Court grants the motion.

12 **III. WATERMASTER ROLES AND REVIEW OF WATERMASTER ACTIONS**

13 **A. Introduction**

14 There are four general categories of Watermaster actions identified in the Judgment: There
15 are Watermaster functions to administer the Physical Solution and to serve the Court in that regard;
16 there is one action under Paragraph 41 explicitly identified as “discretionary”; there are numerous
17 actions which the Watermaster is directed to take upon recommendation or advice of the Advisory
18 Committee or with Advisory Committee approval; and there are all other actions which do not fall
19 within one of these three categories. These categories are important for purposes of determining
20 which processes provided in the Judgment for review of Watermaster actions apply to a particular
21 action. There are two Court review processes available: Paragraph 31 provides for review by the
22 Court of all Watermaster actions, decisions, or rules; and Paragraph 15 provides for motions to the
23 Court for “further or supplemental orders or directions” or to “modify, amend or amplify” the
24 Judgment. There are also two procedural routes, discussed *infra*, that provide for Advisory

25
26 ⁷There has been some suggestion in the briefing and in closing remarks during the hearing that
27 a five-member board consisting of two members from CBMWD, one from Three Valleys Municipal
28 Water District, one from Western Municipal Water District, and one from some other entity such as
DWR should be considered. (TR at 144:18-23.) This suggestion is incomplete and would require
additional consideration by the parties which may further delay appointment of a new Watermaster.

1 Committee review and can lead to Court review: the Paragraph 38(b), 38(b)[2], 38(c) process; and
2 the 38(b)[1], 38(c) process.

3 By analyzing the Judgment in terms of these categories of Watermaster action and avenues
4 of review, it is possible to assess how appropriately to handle issues not explicitly covered by the
5 Judgment, such as the special audit costs. In the case of the special audit, that action of the
6 Watermaster to incur the expense is not an action to carry out the Physical Solution, does not fall
7 within the explicit “discretionary” category, and is not covered by any provision explicitly requiring
8 Advisory Committee recommendation or approval; therefore, it is within the “other action” category.
9 As such, it is reviewable by the Court upon a Paragraph 31 motion, it does not fall within the purview
10 of Paragraph 38(b), or the Subparagraph 38(b)[1] Advisory Committee mandate process, and does
11 not require further order of the Court or any change in the Judgment such as the Paragraph 15
12 process would provide.

13 **B. The Watermaster Has Duties and Powers to Administer and Enforce the**
14 **Provisions of the Judgment and, Pursuant to the Judgment and Further**
Direction of the Court, to Administer and Implement the Physical Solution

15 The Watermaster is appointed “to administer and enforce the provisions of this Judgment and
16 any subsequent instructions or orders of the Court hereafter.” (Judgment at ¶ 16.) The
17 Watermaster’s powers and duties are defined explicitly and exclusively with relationship to the Court,
18 not the Advisory or Pool Committees:

19 17. Powers and Duties. Subject to the continuing supervision and control of the
20 Court, Watermaster shall have and may exercise the express powers, and shall
21 perform the duties, as provided in this Judgment or hereafter ordered or authorized
by the Court in the exercise of the Court’s continuing jurisdiction.

22 This special relationship between the Court and Watermaster is most fully described in the
23 Physical Solution provisions of the Judgment and provisions related to carrying out the Physical
24 Solution. The Court expressly:

- 25 ● Adopted an order to parties “to comply with the Physical Solution.” (Judgment at
26 ¶ 39.)
- 27 ● Appointed the Watermaster “to administer and enforce” the Judgment. (Judgment at
28 ¶ 60.)

1 Under the Judgment, the Watermaster's duties and powers that are subject to the Court's
2 continuing jurisdiction (Judgment at ¶ 17) are extensive:

- 3 • The Watermaster can seek Court review by motion requesting the Court under its
4 continuing jurisdiction to “. . . make such further or supplemental orders or directions
5 as may be necessary or appropriate for interpretation, enforcement or carrying out of
6 this Judgment, and to modify, amend or amplify any of the provisions of this
7 Judgment.” (Judgment at ¶ 15.)
- 8 • Subject to that continuing supervision and control of the Court, “. . . Watermaster
9 shall have and may exercise the express powers, and shall perform the duties, as
10 provided in this Judgment or hereafter ordered or authorized by the Court in the
11 exercise of the Court's continuing jurisdiction.” (Judgment at ¶ 17.)
- 12 • The Watermaster is to be assisted in performing its functions under the Judgment by
13 pool Committees, representing the pools created under the Physical Solution, and the
14 Advisory Committee. (Judgment at ¶ 32.)
- 15 • The purpose of the Physical Solution provisions “. . . is to establish a legal and
16 practical means for making the maximum reasonable beneficial use of the waters of
17 Chino Basin by providing the optimum economic, long-term, conjunctive utilization
18 of surface waters, ground waters and supplemental water, to meet the requirements
19 of water users having rights in or dependent upon Chino Basin.” (Judgment at ¶ 39.)
20 Maximizing the beneficial use of Chino Basin waters makes it “essential that this
21 Physical Solution provide maximum flexibility and adaptability in order that
22 Watermaster and the Court may be free to use existing and future technological,
23 social, institutional and economic options . . .” (Judgment at ¶ 40.)
- 24 • Groundwater “. . . reservoir capacity utilization for storage and conjunctive use of
25 supplemental water [must] be undertaken only under Watermaster control and
26 regulation, in order to protect the integrity of both such Stored Water and Basin
27 Water in storage and the Safe Yield of Chino Basin.” (Judgment at ¶ 11.)⁸
- 28 • With Advisory and Pool Committee advice and assistance, the Watermaster is to
establish the procedures and administer the withdrawal and supplemental water
replenishment of basin water as required to accomplish “full utilization of the water

21 ⁸The Judgment enjoins storage or withdrawal of stored water “except pursuant to the terms
22 of a written agreement with Watermaster and [that] is [in] accordance with Watermaster regulations.”
23 (Judgment ¶ 14.) The Court must first approve, by written order, the Watermaster's execution of
24 “Ground Water Storage Agreements.” (Judgment ¶ 28.) The Advisory Committee's role is limited
25 to giving its approval before the Watermaster can adopt “uniformly applicable rules and a standard
26 form of agreement for storage of supplemental water.” (*Id.*) However, groundwater storage rules
27 and the standard form of agreement must be “uniformly applicable”, which intrinsically leaves to the
28 Watermaster the decision to execute agreements and, ultimately, to the Court (and notably not the
Advisory Committee) the authority to approve those agreements. The Judgment's injunction against
unauthorized production (Judgment ¶ 13) and injunction against unauthorized storage or withdrawal
of stored water (Judgment ¶ 14) are integral parts of the Judgment's Physical Solution, and the
requirement for direct Court approval of Watermaster storage agreements is another manifestation
of the Watermaster's and Court's special relationship.

1 resources of Chino Basin,” which encompasses preservation of both the water
2 quantity and quality of basin resources. (Judgment at ¶ 41.)

- 3 • Watermaster is required to undertake socioeconomic impact studies of the assessment
4 formula (set forth in Exhibit H to the Judgment) and its possible modification for the
5 appropriator pool no later than ten years from the “effective date of this Physical
6 Solution.” (Judgment at Exhibit H, ¶ 8.)⁹

7 Exhibit I to the Judgment, the “Engineering Appendix,” sets forth the parameters the
8 Watermaster “shall consider . . . in the process of implementing the physical solution for Chino
9 Basin”:

10 1. Basin Management Parameters. In the process of implementing the physical
11 solution for Chino Basin, Watermaster shall consider the following parameters:

12 (a) Pumping Patterns. Chino Basin is a common supply for all persons and
13 agencies utilizing its waters. It is an objective in management of the Basin’s
14 waters that no producer be deprived of access to said waters by reason of
15 unreasonable pumping patterns, nor by regional or localized recharge of
16 replenishment water, insofar as such result may be practically avoided.

17 (b) Water Quality. Maintenance and improvement of water quality is a prime
18 consideration and function of management decisions by Watermaster.

19 (c) Economic Considerations. Financial feasibility, economic impact and the
20 cost and optimum utilization of the Basin’s resources and the physical
21 facilities of the parties are objectives and concerns equal in importance to
22 water quantity and quality parameters.

23 (Judgment at Exh. I, ¶ 1.)

24 The Watermaster’s special relationship to the Court in carrying out the Physical Solution also
25 was discussed at the hearing. The parties during the hearing described the Watermaster as an “arm
26 of the Court” and as such can take matters to the Court, funded by all the producers, to address
27 anything that may alarm the Watermaster. (TR at 40:11-21.) This role is described as being separate
28 from the ministerial or day-to-day activities of the Watermaster. (TR at 75:1-15.) This role is further
described as one of a public advocate, to ensure independent review of what is occurring in the basin.
(TR at 81:10-15.) When asked whether the role of the Watermaster was to be a “steward of a basin
resource including water quality,” the response was “yes”, including that the Watermaster should

⁹We do not have information on whether this Watermaster task has been accomplished, but
the 15 percent/85 percent assessment formula appears not to have been changed. (TR at 29:22-25.)

1 ensure that there is not a waste or unreasonable use of basin water. (TR at 83-84.) Accordingly, the
2 parties agree that the Watermaster is a steward of Chino Basin groundwater resources and this role
3 may involve taking positions adverse to the Advisory Committee. (See TR at 110-111.)

4 **C. Only One Watermaster Function Is Explicitly Identified as “Discretionary,” to**
5 **“Develop an Optimum Basin Management Program” for the Chino Basin**

6 Although there is reference in Subparagraph 38(b)[2] to “any discretionary action” of
7 Watermaster, there in fact is only one area in which the Watermaster is explicitly granted
8 “discretionary powers” under the Judgment, and that is to develop an Optimum Basin Management
9 Program. (Judgment at ¶ 41.)

10 The “any discretionary action” phrase in Subparagraph 38(b)[2] implies that there are
11 Watermaster actions in addition to development of the Optimum Basin Management Program that
12 are also “discretionary actions.” The “any discretionary [Watermaster] action” phrase in
13 Subparagraph 38(b)[2] appears to serve as a “catch-all” provision, intended to ensure that the
14 Advisory Committee will have notice if the Watermaster ever proposes to take an action which has
15 “slipped through the cracks” and is not otherwise expressly subject to Advisory Committee or Pool
16 Committee review. Paragraph 40 raises the prospect of the Watermaster taking an action which
17 could be described as “any discretionary action”:

18 40. Need for Flexibility. It is essential that this Physical Solution provide maximum
19 flexibility and adaptability in order that Watermaster and the Court may be free to use
20 existing and future technological, social, institutional and economic options, in order
21 to maximize beneficial use of the waters of Chino Basin. To that end, the Court’s
retained jurisdiction will be utilized, where appropriate, to supplement the discretion
herein granted to the Watermaster.

22 The Court might “supplement the [Watermaster’s] discretion” under Paragraph 40, and leave to the
23 Watermaster the decision as to how to exercise that supplemental discretion. Any “discretionary
24 action” the Watermaster might take in that context would be subject to the Paragraph 38(b)[2]
25 process. Other than when the Court might supplement the Watermaster’s discretion, every
26 conceivable Watermaster action appears to have been anticipated in the Judgment and Advisory or
27 Pool Committee participation provided for.

28 The overall process of developing an Optimum Basin Management Program is, essentially,

1 a collaborative process that involves the Watermaster, Advisory Committee, Pool Committees, and
2 the Court. However, since the power to develop an Optimum Basin Management Program is granted
3 to the Watermaster with only the advice of the Advisory and Pool Committees, the Watermaster's
4 role can fairly be described as providing impetus for that collaborative process and carrying it through
5 to completion.

6 **D. Numerous Watermaster Functions Under the Judgment Explicitly Require**
7 **Advisory Committee Approval or are Required to be Undertaken Upon**
8 **Recommendation or Advice of the Advisory Committee, and Are Not Identified**
9 **As "Discretionary"**

10 **1. Advisory Committee Recommendation or Advice**

11 The Watermaster can take certain actions only upon the recommendation or advice of the
12 Advisory Committee.

- 13 • The Watermaster shall make and adopt rules and regulations upon the
14 recommendation of the Advisory Committee. (Judgment at ¶ 18.)
- 15 • Subject to prior recommendation or approval of the Advisory Committee, the
16 Watermaster may act jointly or cooperatively with other agencies of the United States
17 or the State of California to carry out the Physical Solution. (Judgment at ¶ 26.)
- 18 • The Watermaster may, with the concurrence of the Advisory Committee or the
19 affected Pool Committee and in accordance with Paragraph 54(b), conduct studies
20 related to implementation of the management program for the Chino Basin.
21 (Judgment at ¶ 27.)
- 22 • Watermaster shall submit an administrative budget recommendation to the Advisory
23 Committee, who shall review and submit its recommendations back to the
24 Watermaster, and thence a hearing shall be held to adopt the administrative budget
25 for the year. (Judgment at ¶ 30.)
- 26 • Watermaster is to implement Pool Committee policy recommendations for
27 administration of the particular pools. (Judgment at ¶ 38(a).)
- 28 • Watermaster must act consistent with an Advisory Committee recommendation that
has been approved by 80 or more votes, but has the right to bring the issue before the
Court. (Judgment at ¶¶ 38(b)[1] and 38(c).)
- As to the Optimum Basin Management Program itself, the Advisory Committee can
"act upon all discretionary [Watermaster] determinations," as well as "study,"
"recommend," and "review" them. (Judgment at ¶ 38(b).)
- Watermaster must give notice and conduct a meeting prior to executing an agreement
not within the scope of an Advisory Committee recommendation. (Judgment at
¶ 38(b)[2].)
- The "respective pooling plans" direct how the Watermaster shall levy and collect

1 annual replenishment assessments (Judgment at ¶ 45) and production assessments.
2 (Judgment at ¶ 51.)

- 3 • The Watermaster “may accomplish replenishment of overproduction from the Basin
4 by any reasonable method,” subject to Paragraph 19’s direction that the Watermaster
5 not acquire real property interests or “substantial capital assets,” Paragraph 25’s
6 limitation on the Watermaster’s authority to enter into contracts involving the Chino
7 Basin Municipal Water District, and Paragraph 26’s provision that the Watermaster’s
8 authority to act jointly or cooperate with other entities to “fully and economically”
9 carry out the Physical Solution is “subject to prior recommendation or approval of the
10 Advisory Committee.” (Judgment at ¶ 50.)
- 11 • The parties agree that one of the Watermaster’s duties is to carry out the direction of
12 the Advisory Committee as provided in the Judgment. (TR at 109:24.)

9 2. Pool Committee Requirements

10 The Pool Committees also can require Watermaster implementation of their “actions and
11 recommendations.” (Judgment at ¶ 38(a).) For most purposes, these need not be considered
12 separately from Advisory Committee recommendations and advice, since any disputed direction from
13 a Pool to the Watermaster would be made through the Advisory Committee. However, the Pool
14 Committees have extensive authority as to the allocation and approval of “special project expenses”
15 incurred in administration of the Physical Solution.¹⁰ Judgment Paragraph 54 provides in part:

16 (b) Special Project Expense shall consist of special engineering or other studies,
17 litigation expense, meter testing or other major operating expenses. Each such project
18 shall be assigned a Task Order number and shall be separately budgeted and
19 accounted for.

20 . . . Special Project Expense shall be allocated to a specific pool, or any portion
21 thereof, only upon the basis of prior express assent and finding of benefit by the Pool
22 Committee, or pursuant to written order of the Court.¹¹

23 (Judgment at ¶ 54.) These provisions will be central in development of implementation and financing
24 elements of the Optimum Basin Management Program.

25 ///

26 ¹⁰The Watermaster is directed to allocate and assess “general Watermaster administrative
27 expenses” to the respective pools “as based upon generally accepted cost accounting methods.”
28 (Judgment at ¶ 54.) This Watermaster function fits within the “other action” category.

¹¹The Paragraph 54 “pursuant to written order of the Court” language implies that the
Watermaster could, through the Paragraph 15 motion procedure, propose a special project expense
be undertaken and obtain Court approval for allocation of the costs of the expense.

1 **E. Many Other Watermaster Functions under the Judgment Do Not Require**
2 **Advisory Committee Approval or Recommendation, and Are Not Identified as**
3 **“Discretionary”**

4 **1. Watermaster Functions in the Normal Course of Business**

5 The Judgment expressly sets forth particular functions of the Watermaster which delineate
6 the day-to-day affairs of the Watermaster:

- 7 ● Watermaster may acquire facilities and equipment other than any interest in real
8 property or substantial capital assets. (Judgment at ¶ 19.)
- 9 ● Watermaster may employ or retain administrative, engineering, geologic, accounting,
10 legal or specialized personnel and consultants as deemed appropriate. (Judgment at
11 ¶ 20.)
- 12 ● Watermaster shall require the parties to install and maintain in good operating
13 condition necessary measuring devices. (Judgment at ¶ 21.)
- 14 ● Watermaster is to levy and collect all assessments as provided for in the pooling plans
15 and Physical Solution. (Judgment at ¶ 22.)
- 16 ● Watermaster may invest funds in investments which are authorized for public
17 agencies. (Judgment at ¶ 23.)
- 18 ● Watermaster may borrow money. (Judgment at ¶ 24.)
- 19 ● Watermaster may enter into contracts (other than with CBMWD) without the prior
20 recommendation and approval of the Advisory Committee and written order of the
21 Court for the performance of any powers granted in the Judgment. (Judgment at
22 ¶ 25.)
- 23 ● Watermaster conducts the accounting for the stored water in Chino Basin. (Judgment
24 at ¶ 29.)

25 In addition, Watermaster is specifically required to levy and collect assessments each year pursuant
26 to the respective pooling plans in amounts sufficient to purchase replenishment water to replace
27 production by any pool during the preceding year which exceeds that pool’s allocated share of safe
28 yield or operating safe yield. (Judgment at ¶ 45.) Watermaster shall also file an annual report
29 containing details as to operation of each of the pools and a certified audit of all assessments and
30 expenditures and a review of Watermaster’s activities. (Judgment at ¶ 48.)

31 **2. Watermaster Functions Related to Administering the Pool Committees**

32 The Watermaster was directed to cause producer representatives to be organized to act as
33 Pool Committees for each of the pools created under the Physical Solution. The Pool Committees’
34 responsibility is to develop policy recommendations for administration of the particular pools, which

1 are transmitted to the Watermaster for action. Basically:

- 2 • The Watermaster administers the three “operating pools” to carry out the
3 “fundamental premise of the Physical Solution . . . that all water users dependent upon
4 Chino Basin will be allowed to pump sufficient waters from the basin to meet their
5 requirements . . . , and each pool will provide funds to enable Watermaster to replace
6 such overproduction.” (Judgment at ¶ 42.)
- 7 • The Watermaster administers the three pools which are responsible for and must pay
8 for the “. . . cost of replenishment water and other aspects of this Physical Solution.”
9 (Judgment at ¶ 43.)
- 10 • The Watermaster can levy and collect annual replenishment assessments (Judgment
11 at ¶ 45) and production assessments (Judgment at ¶ 51).

12 3. Watermaster Functions Related to Administering the Physical Solution

13 Watermaster functions particularly related to administering the Physical Solution include:

- 14 • The Watermaster is directed to “seek to obtain the best available quality of
15 supplemental water at the most reasonable cost for recharge in the Basin” (Judgment
16 at ¶ 49) and to “accomplish replenishment of overproduction from the Basin by any
17 reasonable method . . .” (Judgment at ¶ 50).
- 18 • The Watermaster has the power to “institute proceedings for levy and collection of
19 a Facilities Equity Assessment” upon recommendation of the Pool Committee; and
20 the Judgment suggests that: “To the extent that the use of less expensive alternative
21 sources of supplemental water can be maximized by the inducement of a Facilities
22 Equity Assessment . . . it is to the long-term benefit of the entire basin that such
23 assessment be authorized and levied by Watermaster.” (Judgment at Exh. H, ¶ 9(a).)

24 F. The Judgment Provides for Specific Notice and Review Processes

25 1. The Paragraphs 38(b), 38(b)[2], and 38(c) Process

26 Judgment Paragraphs 38(b), 38 (b)[2], and (c) provide:

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

[2] Committee Review. In the event Watermaster proposes to take any
discretionary action . . . notice of such intended action shall be served on the
Advisory Committee and its members at least thirty (30) days before the
Watermaster meeting at which such action is finally authorized.

(c) Review of Watermaster Actions. Watermaster (as to mandated action), the
Advisory Committee or any pool committee shall be entitled to employ counsel and
expert assistance in the event Watermaster or such pool or Advisory Committee seeks
court review of any Watermaster action or failure to act. . .

(Judgment at ¶¶ 38(b), (b)[2], and (c).) This Advisory Committee review process by its terms covers
only “discretionary determinations made or to be made hereunder by Watermaster”; it does not

1 necessarily cover all other actions of the Watermaster that are not identified as “discretionary
2 determinations.” Subparagraph 38(b)[2] provides that “any discretionary action” (with two
3 exceptions which are not relevant)¹² requires notice to the Advisory Committee; the Advisory
4 Committee, upon receiving notice, would presumably directly seek Court review under Paragraph
5 31.

6 **2. Subparagraphs 38(b)[1] and 38(c) Process**

7 **a. Application of 38(b)[1] Process**

8 Judgment Subparagraphs 38(b)[1] and 38(c) provide:

9 [1] Committee Initiative. When any recommendation or advice of the
10 Advisory Committee is received by Watermaster, action consistent therewith
11 may be taken by Watermaster; provided, that any recommendation approved
12 by 80 votes or more of the Advisory Committee shall constitute a mandate for
13 action by Watermaster consistent therewith. If Watermaster is unwilling or
14 unable to act pursuant to recommendation or advice from Advisory
15 Committee (other than such mandatory recommendations), Watermaster shall
16 hold a public hearing, which shall be followed by written findings and
17 decision. Thereafter, Watermaster may act in accordance with said decision,
18 whether consistent with or contrary to said Advisory Committee
19 recommendation. Such action shall be subject to review by the court, as in the
20 case of all other Watermaster determinations.

21 (c) Review of Watermaster Actions. Watermaster (as to mandated action), the
22 Advisory Committee or any pool committee shall be entitled to employ counsel and
23 expert assistance in the event Watermaster or such pool or Advisory Committee seeks
24 court review of any Watermaster action or failure to act. . .

25 The Subparagraph 38(b)[1] Advisory Committee mandate procedure applies expressly to
26 situations in which “any recommendation or advice of the Advisory Committee is received by
27 Watermaster.” In situations where the Advisory Committee has already given recommendations and
28 advice, it can thus insist, or mandate, that its recommendations or advice be taken if it has 80 or more

23 ¹²Subparagraph 38(b)[2] requires Watermaster to give notice to the Advisory Committee of
24 “any discretionary action, other than approval or disapproval of a Pool committee action or
25 recommendation properly transmitted.” (Judgment at ¶ 38(b)[2], emphasis added.) It must also
26 notify the Advisory Committee under this subparagraph if it proposes to execute any agreement not
27 theretofore within the scope of an Advisory Committee recommendation since the Watermaster
28 generally can “cooperate” with other agencies only upon “prior recommendation or approval of the
Advisory Committee.” (Judgment at ¶ 26.) A Pool Committee action or recommendation that was
“properly transmitted” would already have been noticed to the other two pools and would have had
Advisory Committee review if “any objections” had been raised. (Judgment at ¶ 38(a).)

1 votes.¹³

2 **b. The Ramifications of Paragraph 38(c)**

3 The Judgment fully anticipates that the Watermaster and Advisory Committee will not agree
4 at all times. (TR at 40:14 *et seq.*) Subparagraph 38(b)[1] makes it clear that the Watermaster may
5 or may not decide to take action that is consistent with the recommendation or advice of the Advisory
6 Committee. Except when an Advisory Committee recommendation is “mandatory” (i.e., is approved
7 by 80 or more of 100 votes), a procedure is provided for the Watermaster to take independent action.
8 (Judgment at ¶ 38(b)[1].) Even where the Advisory Committee recommendation is “mandatory”, the
9 Judgment anticipates that the Watermaster might still disagree. In such an event, the Watermaster
10 can “employ counsel and expert assistance” (as a Watermaster expense) (Judgment ¶ 38(c)), and “as
11 to any mandated action” may apply to the Court for review. (Judgment ¶ 31(b).)

12 When the Watermaster brings a motion to the Court to review a “mandated action”, its legal
13 and expert costs in seeking Court review are a “Watermaster expense to be allocated to the affected
14 pool or pools.” (Judgment at ¶ 38(c).) The Advisory and Pool Committees enjoy the same benefit
15 when they seek Court review of “any Watermaster’s action, decision or rule.” (*Id.*) However, when
16 any individual party exercises its right to seek Court review, it must shoulder its own legal and expert

17
18 ¹³Judge Turner, in his 1989 Order, stated:

19 The Advisory Committee takes actions on all matters considered by the various pools
20 and submits its recommendations to the Watermaster. The Advisory Committee is
21 the policy making group for the basin. Any action approved by 80% or more of the
22 Advisory Committee constitutes a mandate for action by the Watermaster consistent
23 therewith.

24 (Statement of Decision and Order Re Motion for Review of Watermaster Actions and Decisions Filed
25 by Cities of Chino and Norco and San Bernardino County Waterworks District No. 8 [hereinafter
26 “Judge Turner Order”] at 3:4-9.) This statement was made in Judge Turner’s introductory remarks
27 to his Order and thus is properly characterized as dicta. As discussed herein, the Advisory
28 Committee, Pool Committee, and Watermaster roles in terms of policy decision is perhaps best
described as collaborative. There is no question the Advisory Committee is implicitly intended to
propose policy, but it does not have an exclusive role in that regard. Further, it is clear that the
mandate by 80% or more votes of the Advisory Committee can be appealed to the Court by the
Watermaster, and applies only where the Watermaster action is to be subject to recommendations or
advice of the Advisory Committee.

1 costs. This is viewed by several parties to be a significant factor that should be weighed in
2 considering the independence of the Watermaster. (TR at 41:9-23, 43:15-20, 75:10-16, 76:5 to 77,
3 and 100:11-18.) They argue that the Watermaster can bring before the Court issues which may not
4 be raised by a party (for financial or other reasons). (*Id.*)

5 Of course, the Watermaster must first agree to speak for the party by bringing a motion to
6 the court consistent with the party's interests for this function to have value. As discussed *supra*, the
7 Watermaster apparently has not historically played this role. Further, the Watermaster can only bring
8 a motion on "mandated" actions (unless the Watermaster seeks review of the Judgment by way of
9 Paragraph 15), hence a party would still have to bring its own motion on other, non-mandated
10 Watermaster actions, unless a Pool Committee or Advisory Committee brought the matter to the
11 Court's attention.

12 3. Court Review Under Paragraph 31

13 Paragraph 31 provides for review of all Watermaster actions, decisions or rules:

14 31. Review Procedures. All actions, decisions or rules of Watermaster shall be
15 subject to review by the court on its own motion or on timely motion by any party,
16 the Watermaster (in the case of a mandated action), the Advisory Committee, or any
17 pool committee as follows:

18 (b) Noticed Motion. Any party, the Watermaster (as to any mandated
19 action), the Advisory Committee or any pool committee may, by a regularly
20 noticed motion, apply to the court for review of any Watermaster's action,
21 decision or rule . . .

22 (Judgment at ¶¶ 31 and 31(b).) The Paragraph 31 review is not limited to whether a Watermaster
23 action is "discretionary" or whether such action was the subject of Watermaster recommendations
24 or advice; Paragraph 31 review could therefore be pursued whether or not a Paragraph 38(b)[1]
25 Advisory Committee mandate were involved.

26 The Paragraph 31 review procedure would apply to "other actions" of Watermaster, such as
27 the special audit. The costs of the special audit were properly reviewable under the Section 31
28 procedure, although not subject to the Paragraph 38(b)[1] Advisory Committee mandate or the
Paragraph 38(b) study, recommendation, review and action process for "discretionary"
determinations.

4. Court Review Under Paragraph 15

1 An independent review process is provided by the Judgment. Paragraph 15 of the Judgment
2 provides for continuing jurisdiction, such that full jurisdiction, power and authority are retained and
3 reserved to the Court as to all matters except: (1) the redetermination of safe yield during the first
4 ten years of operation of the Physical Solution, (2) the allocation of safe yield as set forth in
5 Paragraph 44, (3) the determination of specific quantitative rights and shares of the declared safe yield
6 or operating safe yield, and (4) the amendment or modification of Paragraphs 7(a) and (b) of Exhibit
7 H during the first ten years of operation of the Physical Solution. As indicated in Paragraph 15:

8 Continuing jurisdiction is provided for the purpose of enabling the Court, upon
9 application of any party, the Watermaster, the Advisory Committee or any Pool
10 Committee, by motion and, upon at least 30 days' notice thereof, and after hearing
11 thereon, to make such further or supplemental orders or directions as may be
12 necessary or appropriate for interpretation, enforcement or carrying out of this
13 Judgment, and to modify, amend or amplify any of the provisions of this Judgment.

14 (Judgment at ¶ 15.)

15 This review provision does not limit any party, the Watermaster, the Advisory Committee or
16 a Pool Committee in seeking review of any action or failure to act. This provision allows the
17 Watermaster, any party, a Pool Committee or the Advisory Committee to bring to the attention of
18 the Court any contention it may have with regard to the Physical Solution or the Judgment itself as
19 well as day-to-day affairs conducted by the Watermaster. In addition, it grants the Watermaster the
20 right to bring to the attention of the Court any activity of the Pool Committee or Advisory Committee
21 which it deems inappropriate.

22 **IV. STATUS OF THE "OPTIMUM BASIN MANAGEMENT PROGRAM"**

23 **A. The Court Recommended in 1989 That Within Two Years of that Date the 24 Watermaster Prepare an Integrated Optimum Basin Management Program 25 Document**

26 The Watermaster is granted discretionary power to develop an Optimum Basin Management
27 Program which includes both water quantity and quality considerations (Judgment at ¶ 41), indicating
28 that the Judgment contemplated the resolution of the continuing water quality problems in the Chino
Basin. In 1989, three members of both the Appropiative Pool and the Advisory Committee brought
a "Motion for Review of Watermaster Actions and Decisions," pointing out "... a great many areas
in which they considered the activities of the Watermaster less than perfect." (Judge Turner Order

1 at 4.) Judge Turner “recommended” that the Watermaster produce the Optimum Basin Management
2 Program within two years. (Judge Turner Order at 10; *see also* TR at 130:16-20.) Judge Turner’s
3 1989 Order states:

4 The Moving Parties contend that the Watermaster has failed to develop an adequate
5 Optimum Basin Management Plan (OBMP). The Watermaster, on the other hand,
6 says that it has an excellent working OBMP although it has not been reduced to a
7 single document. . . . As indicated above, there are studies under way trying to at least
8 define the problem and work out possible solutions. The Court finds no defect in the
9 OBMP, although the Court does recommend that within two years the OBMP be
10 reduced to a single integrated document approved by the Advisory Committee.

11 (Judge Turner Order at pp. 8-10.)

12 Judge Turner recognized the pervasive water quality problems with regard to nitrate buildup
13 from dairy farms and agricultural activities. (Judge Turner Order at 9.) Judge Turner also noted that
14 the fundamental idea behind the Judgment was to guarantee sufficient water for all legitimate users
15 and that the water be of good quality. (Judge Turner Order at 4.) Judge Turner relied on the Santa
16 Ana River nitrate management study to provide assistance in evaluating the nitrate problem (Judge
17 Turner Order at 5) and recognized there was no easy solution. (Judge Turner Order at 9.) Although
18 Judge Turner ordered that the Optimum Basin Management Program be placed into one document
19 and contemplated that the ongoing efforts regarding the nitrate problems would at least partially
20 resolve the water quality issues raised, this has not been the case.

21 The parties have presented sufficient evidence to indicate that the water quality in the Chino
22 Basin has dramatically worsened over the last ten years. The Chino Basin has been identified as the
23 single area with the most critical water quality problem in the Santa Ana River watershed. (MVWD
24 Brief 1, Decl. of J. Grindstaff ¶ 9.) According to the 1990 nitrogen-TDS study, by the year 2000,
25 contamination was expected to have spread over much of the basin. However, the Advisory
26 Committee has been informed that the contamination is worse than projected, and the basin has
27 already achieved the level of contamination projected for the year 2000. (*Id.* at ¶ 16.)

28 All parties seem to agree that water quality is a central matter of dispute. (TR at 82.) The
parties acknowledge that for completion of the Optimum Basin Management Program it is important
to look at what has been done and what problems remain (TR at 118:9-15). There are some basic
critical issues that need to be resolved in terms of basin cleanup, issues which are related to the

1 transition of land use from agriculture to urban uses (TR at 31:19-23), and issues related to how
2 contamination of the lower end of the basin is impacting producers (TR at 32:1-4). There seems to
3 be no disagreement that the key issue is how to clean up the lower part of the basin, and how to
4 allocate the multi-million dollar cost of that cleanup. (TR at 33:7-11, 34:23 to 35:3 and 35:11-22.)
5 As Mr. Koopman, representing the overlying (agricultural) pool noted: "Our water is going bad
6 faster than anybody ever imagined." (TR at 146:2-3.)

7 **B. No Optimum Basin Management Program Has Been Developed, Although**
8 **Extensive Planning Studies Have Been Undertaken and Efforts Have Been**
9 **Made to Address Implementation Issues**

10 **1. The "Task Force Plan" Is Not the Optimum Basin Management**
11 **Program**

12 One of the questions addressed at the hearing was whether there is an "optimum basin
13 management program" in existence at this time. Various parties addressed that question and the
14 answer was that there is not a single document that is the "Optimum Basin Management Plan." (TR
15 at 1:18 to 26:18.) The "Chino Basin Water Resources Management Task Force, Chino Basin Water
16 Resources Management Study Final Summary Report (September 1995)" ("Task Force Plan" or
17 "Plan") was identified as a document that had been prepared as an initial step in the development of
18 a management plan for the Chino Basin. (TR at 21:10 to 22:21.)

19 The Task Force Plan is the "culmination of a planning effort" by the Santa Ana Watershed
20 Project Authority (SAWPA), CBMWD, Western Municipal Water District (WMWD), Metropolitan
21 Water District of Southern California (Metropolitan) and the Chino Basin Watermaster. (Plan at 1-
22 1.) The impetus for developing the Plan is identified as the Chino Basin Judgment, paragraph 41, and
23 Judge Turner's Order. (Plan at pp. 1-2.) SAWPA initiated the effort in 1988, and a "Chino Basin
24 Groundwater Management Task Force" ("Task Force") was created January 1, 1990, by "Project
25 Agreement No. 13" between CBMWD and WMWD "as member agencies of SAWPA." Its purpose
26 was "to formulate an operational plan for managing the overall water resources of the Chino Basin."
27 (*Id.*) Apparently, "Project Agreement No. 13" created a 25-member Task Force made up of 21
28 representatives of the Advisory Committee and one representative each from SAWPA, Metropolitan,
CBMWD and WMWD, and an engineering committee of 9 members, 5 of whom were representatives

1 of the Advisory Committee. (Plan at 1-3 to 1-4.) It is not clear to what extent or whether CBMWD
2 participated in the development of the Plan in its role as Watermaster, rather than in its role as a
3 member of SAWPA.

4 It is clear, however, that the Task Force Plan does not itself constitute the "optimum basin
5 management program" that the Watermaster is directed to develop by Judgment Paragraph 41. The
6 Task Force Plan and even its transmittal letter, make it clear that the effort it reflects does not
7 constitute the "optimum basin management program":

8 The recommended plan thus provides the Task Force with the initial direction it will
9 need to move forward with the additional planning studies required to formulate and
adopt a final overall basin management plan for the Chino Basin.

10 (Letter dated September 22, 1995 from Dennis Smith, Montgomery Watson, to Mr. Mark Norton,
11 SAWPA Project Manager.) The Task Force Plan's final recommendations reflect the fact that the
12 Plan is not the "optimum basin management program":

13 Because there are many overlapping issues, and sometimes conflicting objectives
14 between the programs, it is recommended there be some continuing method of
15 coordinating the various programs to ensure consistency with the direction for the
16 preferred [plan] . . . developed under this study. This can be accomplished through
17 the preparation of an Implementation Plan, developed under the direction of and/or
with input from a task force or committee representing similar interests as the Chino
Basin Water Resources Management Study Task Force. It is desirable that such an
effort proceed relatively soon to help guide implementation of the various elements
that are already under active planning.

18 (Plan at 6-11.)

19 The Task Force viewed the Watermaster's role as limited:

20 Some actions such as revising storage rules and regulations and expanding
21 replenishment facilities and operations can be accomplished principally through the
22 Watermaster. However, implementation of many of the other elements can most
23 effectively be achieved only through a combination of voluntary cooperation and new
24 agreements and/or institutional and financial arrangements. . . significant development
25 work has been ongoing for a number of years (e.g. the current Chino Desalter
Program; Chino Basin MWD's development work together with the local agencies
toward a water reclamation program; and all of Metropolitan's efforts toward a
Conjunctive Storage Program). Each of these efforts is expected to continue, and
involve some of the same agencies as well as the Watermaster in different
combinations.

26 (*Id.*)

27 There is a sense of urgency that pervades the Task Force Plan. Although not all agreed that
28 a "tragedy of the commons" scenario is facing the Chino Basin, the Task Force Plan's forecast

1 certainly suggests exactly that prognosis:

2 . . . if projects are left to be implemented only by individual water agencies as needed
3 to meet water supply requirements, and the full burden of costs are born by the
4 individual purveyor, implementation will likely be postponed as long as possible,
5 and/or other options developed where possible. An obvious example would be for
6 a water purveyor to seek new well locations further north in the basin, and/or deepen
7 existing wells. Such near term solutions are understandable and justified from a local
8 agency perspective, but can have adverse long term implications to overall basin
9 management. Moving production further north will tend to have an adverse impact
10 on basin yield, while deepening pumping wells tends to accelerate downward
11 migration of constituents. In either case, the beneficial impact of removing and
12 exporting greater quantities of salt and nitrate are not realized, and long term water
13 trends would be more adverse than projected under this study. Therefore to facilitate
14 development of the projects included in the plans, implementation strategies should
15 consider various institutional, legal and financial incentives, as has been done with the
16 Chino Desalter program. . . .

10 (Plan at 6-5.)

11 The issues, according to the Task Force Plan, encompass both water quality and water
12 quantity. The water quantity problem is discussed in considerable detail, and is characterized as “an
13 unacceptable condition”:

14 The projected long-term declines in storage and water levels is clearly an unacceptable
15 condition, in addition to the fact that the physical solution to maintaining water levels
16 within the Chino Basin under the judgment is not being met.

16 (Plan at 3-8.) The projected calculated decline in storage for the 1990 to 2040 period is 1.645 million
17 acre feet with maximum water level declines of 140 feet in the southeastern part of the basin.
18 Modeled declines are 1.2 million acre feet. (Plan at 3-5.) The Task Force Plan calls into question
19 the adequacies of current basin replenishment efforts. (Plan at 3-9; Judgment, ¶¶ 42, 45.) As to the
20 future: “All four alternative plans would result in a long-term decline in storage in the basin. . . .
21 Thus the basin would be underreplenished. . . .” (Plan at 6-1.)

22 No complete resolution of water quality problems is suggested. Instead, the Task Force Plan
23 notes:

24 The Chino Basin has experienced on-going water quality degradation for many years.
25 This degradation is demonstrated by increasing salinity and nitrate concentrations in
26 pumped groundwater. This trend is expected to continue in the future.

26 (Plan at ES-3.)

27 The water quality problem is daunting:

28 It is also apparent from reviewing the water quality projections that a major

1 commitment to extraction and treatment of degraded groundwater is needed under
2 all four plans just to maintain the overall basin quality near current levels due to the
3 long-term continuing negative (net increase) salt and nitrogen balance resulting
4 primarily from past and continuing agricultural land use practices.

4 (Plan at 6-5.)

5 **2. The Next Phase of the Task Force Plan Work, to Develop an**
6 **Implementation Plan, Has Not Been Pursued**

7 The Task Force Plan identifies a "Phase III" in which a "... a Final Management Plan will be
8 selected for implementation." (Plan at 1-3.) The anticipated task to develop that final plan included
9 developing "operating plan details," a "financial plan," as well as an "Implementation Plan." (*Id.*)
10 The Plan states: "Phase III will be undertaken after the Task Force has reached agreement on the
11 best management approach for the Chino Basin." (*Id.*) According to one hearing participant, Mr.
12 Grindstaff of Monte Vista Water District:

13 It [Task Force Plan] was adopted, but it had alternatives in it, and the next stage was
14 to actually develop a plan that we would follow. And the advisory committee voted
15 against funding the development of an Implementation Plan.

15 (TR at 23:8-12.) Mr. Ed James, who was chief of Watermaster services at the time of the Task Force
16 Plan, concurred:

17 "... the study was to comply with Judge Turner's request, and it looked at the ideas
18 and we looked at water quality and various management schemes. ... The problem
19 is, the program ended in 1994, and since then we have not implemented the next
20 phase. And that's kind of where we are at this point.

20 (TR at 23:19 to 24:4.)

21 **3. Implementation Actions Have Been Identified**

22 The Task Force Plan suggested that an Implementation Plan would include both water supply
23 and water quality elements. "Preferred plan" elements included:

- 24 • At least 5% water conservation.
- 25 • Retaining production in the southern half of the basin and/or increasing production
26 to the maximum extent possible as agricultural pool production is reduced.
- 27 • Limit continued accumulation of local storage accounts by underproducers in order
28 to decrease their replenishment obligation and the accumulation of storage and
possibly cap local storage accounts, and provide incentives to reduce excess storage
accounts that exist now.

- 1 • Expand spreading capabilities in order to meet future replenishment obligations.
- 2 • Expand reclaimed water use.
- 3 • Increase production of high nitrate and high TDS groundwater with treatment and
- 4 removal facilities (desalters).
- 5 • Consider a conjunctive storage program agreement with Metropolitan up to an
- 6 additional 300,000 acre feet in the basin.

6 (Plan at pp. 6-6 to 6-9.)

7 The Judgment includes guidance as to what should be included in an Optimum Basin
8 Management Program. The purpose and objective of the Physical Solution is to:

9 . . . establish a legal and practical means for making the maximum reasonable
10 beneficial use of the waters of Chino Basin by providing the optimum economic, long-
11 term conjunctive utilization of surface waters, ground waters and supplemental
12 water. . . .

12 (Judgment, ¶ 39.) With the flexibility to “. . . be free to use existing and future technological, social,
13 institutional and economic options. . .” (Judgment ¶ 40), the Watermaster is directed to consider
14 certain “basin management parameters” in implementing the Physical Solution; these “basin
15 management parameters” are set forth in Judgment Exhibit I, the “Engineering Appendix.” Those
16 parameters include:

- 17 • Pumping patterns should be such that “. . . no producer be deprived of access to said
18 waters by reason of unreasonable pumping patterns, nor by regional or localized
19 recharge of replenishment water, insofar as such result may be practically avoided.”
20 (Judgment, Exhibit I, ¶ 1(a).)
- 21 • “Maintenance and improvement of water quality is a prime consideration and function
22 of management decisions by Watermaster.” (Judgment Exhibit I, ¶ 1(b).)
- 23 • “Financial feasibility, economic impact and the cost and optimum utilization of the
24 Basin’s resources and the physical facilities of the parties are objectives and concerns
25 equal in importance to water quantity and quality parameters.” (Judgment, Exhibit
26 I, ¶ 1(c).)

24 This is not a comprehensive list. An initial task for the new Watermaster logically would be
25 to develop a scope of the contents of the Optimum Basin Management Program.¹⁴

27 ¹⁴Judgment Exhibit H, Paragraph 8, directs the Watermaster to undertake socioeconomic
28 impact studies by no later than ten years from the date of the Judgment. This work has apparently
(continued...)

1 **4. The Parties Stated at the Hearing That They Could Agree to a Scope of**
2 **an Optimum Basin Management Program**

3 The parties at the hearing indicated (haltingly) that they could at least agree on what needs
4 to be included in the Optimum Basin Management Program. (TR at 30:3 to 31:12.) There was also
5 extended discussion of the varying views of the basin management planning process status, as well
6 as the dynamic nature of the planning process itself. Mr. Teal for the City of Ontario expressed the
7 concern that:

8 ... one of the impressions here that's been left is that somehow the basin management
9 process is in chaos, when in fact there is some very critical issues that need to be
10 resolved in terms of basin cleanup and the transition from agricultural to urban. And
11 so in fact the basin hasn't really been in chaos. We consider the basin management
12 planning process to be a dynamic process, to be an ongoing process, as we develop
13 a better model of the basin to better identify what are the losses, how is the
14 contamination of the lower end of the basin, how is that impacting the producers.
15 There is very critical economic issues here that need to be recognized.

16 (TR at 31:17 to 32:5.) In Mr. Teal's view, the Task Force Plan:

17 ... was to start the process of that basin management planning so that we could
18 identify what the problem is and we feel we've identified the contamination problem.
19 We have a working model now. We know generally that, yes, there are losses to the
20 basin, and we need to correct that through storage limits. And... we think we have
21 a plan now for storage limits. We need to now develop a plan of how we are going
22 to clean up the lower part of the basin, which is going to cost multiple millions of
23 dollars.

24 (TR at 33:2-11; *see also* TR 127:11 to 133:6.)

25 **5. The Parties Indicated at the Hearing That They Would Not Oppose**
26 **Independent Legal and Technical Oversight on Behalf of the Court of**
27 **the Watermaster's Efforts to Scope and Produce the Optimum Basin**
28 **Management Program**

 In response to the suggestion that the Court require a process to assure that the necessary
planning is indeed occurring and that the Optimum Basin Management Program will be produced
within a reasonable amount of time, no matter who the Watermaster may be, Mr. Markman,
representing the moving parties, stated:

¹⁴(...continued)
not been done (TR at 29:20-25) and should be considered in the scoping process.

1 I think if the referee wants to recommend to the court that as part of your package
2 someone with a fresh look comes in and looks at the process — — where it is and
3 what it needs to accomplish and how it can move — — as a report to the court, I
don't think we would resist that. We're not hiding the ball. And that might be helpful
to the new Watermaster board as well.

4 (TR at 28:21 to 29:3.) Mr. Kidman, representing the opposing parties, agreed: "A plan and a time
5 frame both ought to be mandated." (TR at 29:5-6.)

6 **V. IN THE EXERCISE OF ITS CONTINUING JURISDICTION, THE COURT CAN**
7 **ORDER THE WATERMASTER TO EXERCISE ITS POWER TO PREPARE A**
8 **COMPLETE OPTIMUM BASIN MANAGEMENT PROGRAM AND TO PERFORM**
9 **THAT DUTY PURSUANT TO A PROCESS AND IN ACCORDANCE WITH A**
10 **SCHEDULE SET BY THE COURT**

11 The Court retained and reserved continuing jurisdiction "... for the purpose of enabling the
12 Court, upon application of any party, the Watermaster, the Advisory Committee or any Pool
13 Committee . . . to make such further or supplemental orders or directions as may be necessary or
14 appropriate . . ." to interpret, enforce or carry out the Judgment or to modify, amend or amplify the
15 Judgment provisions. (Judgment at ¶ 15.) The Court is authorized to exercise its retained jurisdiction
16 "... where appropriate, to supplement the discretion herein granted to the Watermaster." (Judgment
17 at ¶ 40.) Further, the Court can act on its own motion to review "all actions, decisions or rules of
18 Watermaster." (Judgment at ¶ 31.) Paragraph 17 further describes the Watermaster's powers and
19 duties as subject to the Court's continuing supervision and control, and directs that the Watermaster
20 shall have the powers and duties "... as provided in this Judgment or hereafter ordered or authorized
21 by the Court in the exercise of the Court's continuing jurisdiction." (Judgment at ¶ 17.) If the
22 Watermaster does not act, presumably the Court has the authority under Paragraphs 17, 31 and 40
23 to issue necessary supplemental orders directing the Watermaster to carry out the Physical Solution
24 under the Judgment. Basically, at the time the Court appoints a new Watermaster, the Court's
25 authority to "make such further or supplemental orders or directions as may be necessary or
26 appropriate for interpretation . . . or carrying out of this Judgment . . ." and to "... supplement the
27 discretion herein granted to the Watermaster . . ." encompasses clarification of the Watermaster's
28 roles and explicit direction to the Watermaster to prepare the Optimum Basin Management Program
within a limited period of time.

The Court's Order in this instance, however, would not remove such Watermaster activities

1 from the Advisory Committee's review. The recommended Court orders as set forth *infra*, are
2 logically characterized as within the "discretionary powers to develop an Optimum Basin
3 Management Program" (Judgment at ¶ 41), or as a "supplement to the discretion herein granted"
4 (Judgment at ¶ 40). If further Order of this Court were to direct that the Watermaster should
5 prepare the Optimum Basin Management Program without being subject to Advisory Committee
6 review and action, the issue of modification of the Judgment would be raised. Changing the
7 relationship of the Advisory Committee and the Watermaster with respect to the Watermaster's
8 development of the Optimum Basin Management Program under its discretionary powers, and the
9 Advisory Committee's power to review and act upon all discretionary determinations made by the
10 Watermaster, would constitute a Judgment modification. As discussed *supra*, there is no motion
11 before the Court to make such a modification, and the Court cannot modify the Judgment on its own
12 motion. However, the recommended Order of the Court in the matter at bar does not envision a
13 change in the structural relationship between the Watermaster and Advisory Committee, but rather
14 a clarification of the roles of the Watermaster, and explicit direction to the Watermaster to prepare
15 the Optimum Basin Management Program within a limited period of time.

16 VI. RECOMMENDATION FOR INTERIM APPOINTMENT

17 A. The Special Referee Recommends that the Court Appoint the Nine-Member 18 Board as Watermaster, for an Interim Period of 24 Months, Commencing 19 January 1, 1998

19 The principal motion before the Court is to appoint the nine-member board as Watermaster.
20 Opposing parties fear that the nine-member board will be controlled by the Advisory Committee; this
21 may occur, but this predilection is not sufficient basis for concluding that there is a compelling reason
22 not to appoint the nine-member board as Watermaster at this time. The events leading up to the
23 motion and the stalemate that has ensued speak loudly, however, to the need for additional Court
24 guidance and oversight of the Watermaster and its Optimum Basin Management Program and
25 process.

26 The court has retained jurisdiction to supplement the discretion granted to the Watermaster
27 under the Judgment, and it is the recommendation of the Special Referee that the Court exercise its
28 retained jurisdiction to issue the orders recommended herein. The important independent functions

1 of the Watermaster envisioned in the Judgment do not appear effectively to have been carried out by
2 the existing Watermaster and may not be effectively carried out by the nine-member board.

3 However, it is crucial to break the current deadlock; continuing at loggerheads will not
4 address the problems that have arisen since the Advisory Committee essentially usurped the role of
5 the Watermaster as to day-to-day activities, nor will it further preparation of the Optimum Basin
6 Management Program. The fact that the Watermaster has not prepared the Optimum Basin
7 Management Program reflects systemic failure of the Judgment and its Physical Solution, and that
8 failure must weigh heavily in the decision to appoint a new Watermaster.

9 It is the Special Referee's recommendation that the Court appoint the nine-member board as
10 Watermaster, but only for an interim, two-year period. Further, the nine-member board should be
11 required to prepare the Optimum Basin Management Program before the end of the interim period.
12 The proposed requirements and schedule are intended to provide the Court with a means to gauge
13 the success of the new Watermaster. If the nine-member board functions successfully, it will have
14 provided the Court with an Optimum Basin Management Program before the end of the two-year
15 period.

16 **B. The Special Referee Recommends that the Court Set Aside its Order Appointing**
17 **DWR as Interim Watermaster, but Direct the Nine-Member Board to Provide**
18 **a Report to the Court by June 1, 1998, on All Aspects of Appointment of DWR**
18 **to Serve as Watermaster, Should it Become Necessary to Replace the Nine-**
18 **Member Board with DWR after the Interim 24-Month Period**

19 If the Court agrees with the recommendation to appoint the nine-member board, the current
20 interim appointment of DWR should be set aside. The Court's Order appointing DWR as interim
21 Watermaster required that the Advisory Committee and Chino Basin Municipal Water District first
22 enter into an agreement with DWR. (Order of Special Reference at p. 9.) That has not been
23 accomplished. (TR at 14:8 to 18:25.)

24 Mr. Kidman, representing parties who oppose the motion to appoint the nine-member board,
25 professed to speak for the "whole basin" against appointment of DWR:

26 . . . I don't think that there's anybody in the whole basin that's very interested in
27 seeing a loss of local control or at least some measure of maintaining local control.
27 And having a state receiver, in effect, appointed is not something that any of us are
28 really looking forward to.

1 (TR at 19:7-12.) Notwithstanding that sentiment, DWR already serves as watermaster for several
2 groundwater basins. Its appointment offers a neutral, proven option to carry out Watermaster
3 functions in the Chino Basin. Because of the uncertainty as to whether the nine-member board will
4 successfully fulfill the Watermaster's duties under the Judgment and exercise its powers for the
5 benefit of the entire Chino Basin, it is prudent to have identified an available and competent
6 replacement which could immediately be appointed, if necessary, in two years. Although a "private
7 entity" Watermaster is not prohibited by any provision of the Judgment, identifying an acceptable
8 private entity is problematic.

9 Further, the Judgment provides that the Court may change the Watermaster on its own motion
10 or on the motion of any party, but, absent compelling reasons to the contrary, the Court must "act
11 in conformance with" a motion to appoint a new Watermaster that is supported by only a "majority
12 of the voting power of the Advisory Committee." (Judgment at ¶ 16.) If the nine-member board
13 appointment is determined by the Court after the two years not to have been successful, the Court
14 could on its own motion immediately appoint DWR as Watermaster. If a majority of the voting
15 power of the Advisory Committee were to then propose an alternative appointment, it would be up
16 to the Court to decide if continuing disruption caused by experimenting with another Advisory
17 Committee-proposed Watermaster would constitute "compelling reason" not to act in conformity
18 with any such further Advisory Committee proposal.

19 VII. RECOMMENDATION FOR COURT OVERSIGHT AND SCHEDULE

20 The Special Referee Recommends:

- 21 1. That the Court order that the parties submit recommendations to the
22 Watermaster as to the scope and level of detail of the Optimum Basin
23 Management Program by March 1, 1998, and that the Watermaster file a
24 written recommendation with the Court by April 1, 1998;
- 25 2. That the Court direct the Special Referee to review the Watermaster's
26 Optimum Basin Management Program scoping recommendations for technical
27 and legal sufficiency, that the Special Referee use an independent technical
28 expert as necessary, and that the Special Referee provide timely written
assessments to the Court on the Watermaster's progress;
3. That the Court order that the Watermaster exercise its discretionary powers to
develop the Optimum Basin Management Program which encompasses the
Implementation Plan elements recommended by the Task Force and submit the
Optimum Basin Management Program to the Court by no later than July 1,

1 1999, or show cause as to why it cannot do so; and

- 2 4. That the Court hold a hearing to consider whether to approve and order full
3 implementation of the Optimum Basin Management Program or consider why
4 the Optimum Basin Management Program has not been completed and filed
with the Court, and that a status report shall be provided to the Court by all
parties as to the continuance of the nine-member board as Watermaster.

5 The Advisory Committee is not envisioned by the Judgment as the “lead” in developing the
6 Optimum Basin Management Program, but rather as an active participant with important oversight
7 roles. The Special Referee recommendation is intended to compel the Watermaster to newly assert
8 itself to provide the impetus needed to develop the Optimum Basin Management Program and to take
9 the lead role as the Judgment intended. The Watermaster has not, to date, carried out that role. The
10 Advisory Committee has, in effect, usurped that role through the Task Force Plan process.¹⁵ From
11 a practical standpoint, the Judgment can perhaps best be interpreted as anticipating that development
12 of the Optimum Basin Management Program will largely be a collaborative process. Of course, the
13

14 ¹⁵The Advisory Committee position implicitly is that it should prepare the Optimum Basin
15 Management Program or the essentially equivalent Implementation Plan. The Task Force Plan
16 recommended that:

17 . . . there be some continuing method of coordinating the various programs to ensure
18 consistency with the direction for the Preferred Water Resources Management
19 developed under this study. This can be accomplished through the preparation of an
Implementation Plan. . .

20 (Plan at pp. 6-11.) The Task Force further suggests that an Implementation Plan can be “. . .
21 developed under the direction of and/or with input from a task force or committee representing
22 similar interests as a Task Force.” (*Id.*) Given the makeup of the Task Force, this is tantamount to
23 suggesting that the Advisory Committee develop the Implementation Plan. The question of whether
the Watermaster should even be the entity to develop the Optimum Basin Management Program was
24 raised in the course of the hearing. Mr. Markman suggested that “an independent watermaster” might
perform certain review functions:

25 It [the Watermaster] is a cog in the process that ultimately brings these issues to the
26 Court. We think it is useful to have a watermaster review the optimum basin
27 management plan. And if it agrees with the minority that opposes that plan, it has two
ways of bringing the matter up to the Court, depending on what the vote was, and
paying for legal counsel to support that position.

28 (TR at 43:11-19.)

1 Court ultimately resolves all issues regarding the Optimum Basin Management Program and
2 implementation of the Physical Solution generally. (Judgment at ¶ 15.)

3 As discussed herein, the provisions related to the Physical Solution define the most important
4 aspect of the Watermaster's special relationship with the Court. Developing the Optimum Basin
5 Management Program to guide implementation of the Physical Solution is, in turn, the most important
6 Watermaster task in carrying out the Physical Solution for the long term.

7 The purpose of the recommended Court oversight and schedule is to provide the Court with
8 a means to gauge the nine-member board's efforts to develop the Optimum Basin Management
9 Program. The particular elements of the program are discussed *supra*, and include both water
10 quantity and water quality actions. Although at the time the Judgment was entered, the full extent
11 of the quantity and quality challenges may not have been fully appreciated, the concept was clearly
12 set forth in the Judgment that the Watermaster would develop an Optimum Basin Management
13 Program that would include both water quantity and quality considerations: "Both the quantity and
14 quality of said water resources may thereby be preserved and the beneficial utilization of the Basin
15 maximized." (Judgment at ¶ 41.) As the Judgment intended and the Task Force Plan confirmed, the
16 full range of problems to be addressed includes every aspect of groundwater basin management,
17 including all implementation and financing decisions.

18 **VIII. RECOMMENDATION FOR PAYMENT OF COSTS OF SPECIAL AUDIT**

19 The Special Referee recommends that the Court find that the special audit is a Watermaster
20 expense. The audit conducted by CBMWD, acting as the Watermaster, is not explicitly defined in
21 the Judgment as a discretionary act, nor is it an action that is explicitly recognized as subject to
22 Advisory Committee recommendation or approval. The record reflects that the special audit was
23 conducted in response to substantial increases in annual budget expenditures, allegations of fraud or
24 theft, and CBMWD recognition that it had lost all control over the Watermaster services staff. It also
25 appears that the special audit was conducted to gain some understanding of what activities were then
26 occurring at the Watermaster staff level. The recommendation of the Special Referee is that the
27 Court find that the special audit was made in the general course of business and was a proper
28 Watermaster expense.

1 IX. CONCLUSION

2 The Special Referee strongly urges that the Watermaster and Advisory Committee were
3 intended to serve separate functions and that they should not be allowed to merge. The intention of
4 the recommendations is to prevent this merger, fully recognizing the risks inherent in the nine-member
5 board appointment. Continued Court review and supervision is imperative.

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DATED: December 12, 1997

Respectfully submitted,


ANNE J. SCHNEIDER, Special Referee

1 PROOF OF SERVICE

2
3 I declare that:

4 I am employed in the County of Sacramento, California. I am over the age of 18 years and
5 not a party to the within action. My business address is ELLISON & SCHNEIDER; 2015 H Street;
6 Sacramento, California 95814-3109; telephone (916) 447-2166.

7 On December 12, 1997 I served the attached:

8 ***REPORT AND RECOMMENDATION OF SPECIAL REFEREE TO COURT***
9 ***REGARDING : (1) MOTION FOR ORDER THAT AUDIT COMMISSIONED BY***
10 ***WATERMASTER IS NOT A WATERMASTER EXPENSE, AND (2) MOTION***
11 ***TO APPOINT A NINE-MEMBER WATERMASTER BOARD***

12 in said cause, by placing a true copy thereof enclosed with postage thereon fully prepaid, for
13 overnight delivery by United Parcel Service mail at Sacramento, California, address as follows:

14 **See attached service list and:**

15 Honorable J. Michael Gunn via facsimile

16 I declare under penalty of perjury that the foregoing is true and correct. and that this
17 declaration was executed at Sacramento, California, on December 12, 1997

18 *Christine Henning*
19 Christine Henning

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