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SUPERIOR COURT OF THE STATE OF CALIFORNIA

9

COUNTY OF SAN BERNARDINO - WEST

10

11 CITY OF CHINO HILLS,

Case No:

12 Petitioner,

PETITIONER CITY OF CHINO HILLS'
BRIEF IN SUPPORT OF VERIFIED
PETITION FOR WRIT OF MANDAMUS AND
REQUEST FOR DECLARATORY RELIEF
PURSUANT TO PUBLIC UTILITIES CODE
§10101 ET SEQ.

13 vs.

14 CITY OF CHINO; CITY COUNCIL
FOR CITY OF CHINO; DIRECTOR
15 OF PUBLIC WORKS FOR CITY OF
CHINO; CITY ENGINEER FOR CITY
16 OF CHINO; and DOES 1 through
100, inclusive,

[REQUEST FOR SPECIAL ASSIGNMENT
TO HON. J. MICHAEL GUNN, DEPT. 8.
SAN BERNARDINO SUPERIOR COURT,
PURSUANT TO JUDGMENT IN RCV 51010
AND PEACE AGREEMENT]

17 Respondents.

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[Filed concurrently with:
Verified Petition for Writ of
Mandate; Request for Judicial
Notice; Declarations of Cindy
Miller, Mike Kapanpour, Mike
Maestas, Douglas La Belle, Mark
Hensley, Anne Tanner Dutrey and
Mark Trautwein; Notice of
Lodgment of Exhibits 1-36; and
Notice of Lodgment of Cases]

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1 I. INTRODUCTION

2 This case involves the unlawful denial by the City of Chino
3 ("Chino or Respondent") of basic water rights belonging to the
4 neighboring City of Chino Hills ("Chino Hills" or "Petitioner").
5 Chino is attempting to coerce Chino Hills to take on potentially
6 staggering liability in return for a simple encroachment permit
7 to connect a water pipeline which will supply drinking water
8 immediately needed for Chino Hills. Chino's tactics are a
9 veiled form of extortion and should be immediately barred.

10 Petitioner Chino Hills brings this Verified Petition for
11 Writ of Mandamus (the "Writ") against Respondent City of Chino,
12 its City Council, its City Engineer, and its Director of Public
13 Works (collectively "Chino" or "Respondent") to compel
14 Respondent to comply with its obligations to issue an
15 encroachment permit for the completion of Phase 2 of the
16 construction of a domestic water pipeline project and to cease
17 and desist its unlawful interference with Petitioner's
18 fundamental right to supply adequate drinking water to its
19 residents.

20 Petitioner has a statutory grant of authority under Public
21 Utilities Code ("PUC") §10101 et seq. to construct a water
22 pipeline below Respondent's right of ways, as well as a vested
23 constitutional contract right to secure its construction.
24 Respondent has blocked construction by imposing improper
25 eleventh hour terms and conditions upon the issuance of an
26 encroachment permit and enacting an urgency ordinance imposing
27 new, indefinite and potentially unlimited indemnity obligations
28 on permit applicants. In so doing, Respondent has reneged on

1 its prior agreement and unlawfully interfered with Petitioner's
2 legislative grant.

3 Judicial intercession is necessary to force Respondent to
4 comply with its obligations under Petitioner's legislative grant
5 and pursuant to its prior agreement to permit Petitioner to
6 supply necessary drinking water to its inhabitants. This court
7 should determine that the completion of Phase 2 of the pipeline
8 project is appropriate under PUC § 10101 et seq., construction
9 of which can proceed immediately as designed.

10 The Court should further compel Respondent to issue an
11 encroachment permit with normal and customary terms and
12 conditions for Phase 2 construction *nun pro tunc* to the August
13 22, 2000 and July 12, 2001 dates on which permit applications
14 were submitted. Further, the Court should invalidate
15 Respondent's urgency ordinances under principles of preemption
16 and as unconstitutionally vague and ambiguous.

17 II. STATEMENT OF FACTS

18 Upon its incorporation in December 1991, Chino Hills
19 assumed control of the supply of drinking water to its
20 residents. In accordance with the Judgment,¹ Chino Hills met its
21 water demands through the use of imported water obtained from
22 the Water Facilities Authority ("WFA") in the amount of 10.68

23
24 ¹ The Chino Basin Judgment in the matter of Chino Basin Municipal Water
25 District v. City of Chino, et al., San Bernardino Superior Court Case No. RCV
26 51010 (formerly case no. 164327), established a judicially supervised system
27 to maintain a water supply to meet the needs of all water producers in the
28 Chino Basin. Several other key agreements have resulted from the Judgment,
to which both, Chino and Chino Hills are parties: the Peace Agreement, the
Rules and Regulations, and the Chino Basin Optimum Basin Management Program
("OMBP"). These agreements require, inter alia, that no signatories
interfere with each other's right to adequate water supply and further vest
exclusive jurisdiction in Hon. J. Michael Gunn, San Bernardino Superior
Court, to adjudicate all disputes connected with these agreements.

1 million gallons per day ("MGD") and 8.66 MGD from pumping out of
2 local groundwater wells. (Writ ¶ 14.) In December 1995, the
3 State of California Department of Health Services ("DHS") issued
4 a compliance order to Chino Hills for, *inter alia*, not having
5 sufficient maximum daily capacity for meeting its maximum daily
6 needs. (Writ ¶ 15.)

7 In order to address its water needs and satisfy the DHS
8 order, Chino Hills developed and implemented water plans² that
9 accounted for projected development, population growth, reserve
10 capacity and accommodated ultimate average daily and maximum
11 daily demands of 20.8 MGD and 41.6 MGD, respectively. (Writ ¶
12 16.) Chino Hills could obtain its water supply goals through
13 increasing its use of imported water from the WFA. (Writ ¶ 16.)
14 Chino Hills prepared a draft environmental impact report
15 regarding the impacts of these potential new water supply
16 sources and water transmission facilities, published it for
17 public comment and held public hearings. (Writ ¶ 18.) Chino
18 Hills filed a Notice of Determination certifying a Final
19 Environmental Impact Report (the "FEIR") which Chino did not
20 challenge and which remains in full force and effect. (Writ ¶
21 18.)

22 To meet projected water needs, the FEIR adopted, *inter*
23 *alia*, a priority construction project entitled "Monte Vista
24 Interconnect Transmission Main" (the "Pipeline Project"). (Writ
25 ¶ 19.) The Pipeline Project involves construction of more than

26 _____
27 ² These water plans included the Master Plan of Water Supply dated July 1996
28 prepared by Robert Bein, William Frost & Associates ("RBF"), the Water System
Master Plan dated July 1996 prepared by Lockman & Associates, and the Program
Environmental Report for the City-Wide Master Plans of Water Supply and Water
Distribution (EIR #97-01).

1 six miles of 42-inch pipeline through three jurisdictions and
2 links the Monte Vista Well Fields located in the City of
3 Montclair with Chino Hills, under public right of ways in
4 Montclair, and the County of San Bernardino and Chino. (Writ ¶
5 20.) On May 26, 1998, Chino Hill's City Council, approved the
6 water plans described above, including the construction of the
7 Pipeline Project. (Writ ¶ 19.)

8 The Pipeline Project is necessary because the existing
9 water transmission facilities are 50 years old and do not have
10 sufficient capacity to accommodate any increase in volume. A
11 larger capacity water pipeline is necessary to link the Monte
12 Vista Water District ("MVWD") facilities to water producers like
13 Chino Hills. Water is presently transported to Chino Hills from
14 the MVWD through a 30-inch pipeline known as the Ramona Feeder.³
15 The Ramona Feeder cannot, however, meet additional demand,
16 including, specifically, the additional 10 MGD Chino Hills has
17 obtained from MVWD from the WFA system. The Pipeline Project is
18 designed to accommodate the immediate additional water use
19 demands for Chino Hills, in compliance with the DHS order.

20 Chino was actively involved with Chino Hills in the design
21 and construction planning for the Pipeline Project from 1998
22 through October of 2001 and even insisted upon certain
23 specifications which significantly increased the construction
24 costs. Over this three year period, Chino Hills negotiated with
25 Chino over the terms and conditions for the construction of the
26
27

28 ³ The Ramona Feeder is used by 5 member agencies -- Chino Hills (15.7%), Chino
(5.9%), Upland (23.0%), MVWD (24.0%) and Ontario (31.4%).

1 pipeline, culminating in a binding agreement ("Pipeline
2 Agreement"). (Writ ¶ 22.)

3 The design of the Pipeline Project complies fully with
4 Chino's specific requirements. The Project's design is in
5 accordance with the best known engineering and design practices
6 and specifications for pipeline construction, including the
7 rules, requirements and safety regulations for all the local
8 jurisdictions which the Pipeline Project impacted. (Writ ¶ 42;
9 Trautwein Declaration ¶ 4.) The Project design and construction
10 plan affords maximum security for life and property. (Id.)

11 The Pipeline Agreement entered into between Chino Hills and
12 Chino included specific terms that (1) the 42-inch domestic
13 water pipeline would be constructed underground below East End
14 Avenue from the City of Montclair south to Schaefer Avenue where
15 the pipeline continues east below Schaefer Avenue; (2) Chino
16 would accept \$4,063.81 as the permit/inspection fee; (3) Chino
17 Hills would expedite construction of one segment of the Pipeline
18 Project below East End Avenue at the intersection of Chino
19 Avenue ("Phase 1") to accommodate Chino's street widening
20 project; (4) Chino Hills would design for Chino a 20-inch
21 interconnect at the intersection of East End and Schaefer
22 Avenues (the "Interconnect"); and (5) Chino would impose normal
23 time, place and manner restrictions on the construction of
24 Phases 1 and 2 of the Pipeline Project. (Writ ¶ 22.)

25 Chino Hills detrimentally relied upon the Pipeline
26 Agreement and undertook all of the following actions:

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28 ///

1 (1) Completed Phase 1 of the Pipeline Project at the
2 intersection of East End and Chino Avenues at a cost exceeding
3 \$500,000;

4 (2) Designed the requested Interconnect;

5 (3) Obtained encroachment permits from the City of
6 Montclair, the County of San Bernardino and utilities and
7 agencies impacted by the Pipeline Project (except Chino);

8 (4) Executed a \$3,727,287 contract with Trautwein
9 Construction ("Trautwein") for the completion of Phase 2 of the
10 Pipeline Project (the "Trautwein Contract");

11 (5) Tendered the \$4,063.81 permit fee; (Trautwein
12 Declaration ¶¶ 7-9)

13 (6) Submitted revisions to design plans and specifications
14 for Phase 2 of the Pipeline Project incorporating Chino's
15 comments and conditions in March, June and August of 2000; and

16 (7) Submitted encroachment permit applications for
17 construction of Phase 2 of the Pipeline Project under then-
18 existing Chino Ordinance 88-10 on August 22, 2000 (through RBF)
19 and on July 12, 2001 (through Trautwein). (Writ ¶ 23.)

20 Notwithstanding these actions in reliance on the Pipeline
21 Agreement, Chino has in the past several months sought to impose
22 additional onerous and unrelated terms and conditions and
23 enacted ordinances on a purported emergency basis to block the
24 Phase 2 completion of the Pipeline Project. (Writ ¶¶ 25 and
25 29.)

26 On August 21, 2001 and September 18, 2001 respectively,
27 Chino's City Council enacted Urgency Ordinance 2001-08 (the
28 Urgency Ordinance") and Ordinance No. 2001-09 (collectively the

1 "Amended Ordinances") which amends the existing permit ordinance
2 88-10 (in place when Chino Hills' permit applications were
3 submitted) and requires burdensome new conditions. (Writ ¶ 25.)
4 The new conditions in the Amended Ordinances include a
5 requirement for the execution of a broad, open-ended indemnity
6 certification to undertake liability for all "environmental
7 damages" directly or indirectly caused by the construction.
8 (Writ ¶ 25.) The Amended Ordinances link the issuance of an
9 encroachment permit to an unrelated subsidence dispute⁴ which is
10 within the exclusive jurisdiction of the Honorable J. Michael
11 Gunn in accordance with the Judgment, Peace Agreement, Rules and
12 Regulations and the OBMP. (Writ ¶¶ 25-27.) In so doing, Chino
13 seeks to circumvent and unilaterally amend the Judgment, Peace
14 Agreement, Rules and Regulations and the OBMP. (Writ ¶ 27.)

15 Chino has further sought to unilaterally modify the
16 Pipeline Agreement by imposing extraordinary conditions to the
17 issuance of the permit. (Writ ¶ 28.) Such conditions include,
18 *inter alia*, demand that Chino Hills agree to (1) pay Chino
19 \$20,000; (2) provide Chino with a portion of the water
20 transmission capacity in the pipeline without compensation; (3)

21
22 ⁴ The Subsidence Dispute is a long-standing dispute between Chino and Chino
23 Hills concerning subsidence in the southern portion of Chino. In brief,
24 Chino has for many years contended that deep well pumping by Chino Hills'
25 wells located in Chino has caused large areas of soil subsidence in Chino.
26 The resolution of this acrimonious dispute has been vested in the exclusive
27 jurisdiction of the Hon. J. Michael Gunn, in accordance with the Judgment,
28 Peace Agreement and the OBMP. The Amended Ordinances enacted by Chino,
however, link the issuance of an encroachment permit to the permittee also
undertaking liability for "environmental damages", which may be related to
operation of the DeSalter Facility. This DeSalter Facility is one of several
very significant water works projects for the Chino Basin that has been
ordered under the Judgment, Peace Agreement and OBMP. (Writ ¶ 12) The
Urgency Ordinance expressly identifies the DeSalter Facility as the impetus
or "urgency" for requiring the permittee to take on open-ended indemnity/hold
harmless liability.

1 provide assurances to Chino that none of Chino's current well
2 production will be affected by MVWD's production of water from
3 the north end of the Chino Basin; (4) cease all "deep" water
4 well production to alleviate Chino's subsidence concerns; (5)
5 agree to be perpetually responsible for any damage to Chino's
6 right of way due to the Pipeline Project; (6) execute a form
7 encroachment application containing a hold harmless provision
8 that, if executed, would bind Chino Hills in perpetuity for all
9 environmental damages caused by the subsidence dispute. (Writ ¶
10 29.) Petitioner cannot and has refused to accept the additional
11 terms and conditions. (Writ ¶ 31.)

12 Chino had approved and processed design plans which
13 requires Chino Hills' contractors to obtain an encroachment
14 permit before entering Chino's right of way. Yet, Chino has now
15 refused to process this very encroachment permit applications
16 submitted by Chino Hills' contractors RBF on August 22, 2000 and
17 Trautwein on July 12, 2001. In addition, despite the
18 requirement contained in Ordinance No.88-10 that the application
19 be processed within 10 days, Chino has yet to act on the
20 applications. (Writ ¶ 23.) This flatly contradicts the terms
21 set forth on the design plans which were pre-approved by Chino.
22 Because of this refusal and the resulting impasse, Chino Hills
23 was forced to cancel the Trautwein Contract and has received a
24 claim for \$1.9 million in damages. (Writ ¶ 34; Trautwein
25 Declaration ¶¶ 12-13.)

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1 days of receipt of an encroachment permit application, the City
2 Engineers must act to deny, grant or require additional
3 information (and in the latter event, a one-time additional ten
4 days extension to grant or deny is allowed). Section 12.02.050.
5 Petitioner's representatives submitted the permit
6 applications which Respondent has failed to process. Instead,
7 Respondent sought to condition unrelated terms and agreements
8 upon the issuance of the permit and enacted the Amended
9 Ordinances to impose new and onerous terms and conditions.
10 Petitioner has attempted, without success, to persuade
11 Respondent to issue the permit for the construction of Phase 2
12 of the Pipeline Project. To date, Respondent has refused to do
13 so, despite its Pipeline Agreement which permits Petitioner to
14 complete construction of Phase 2.

15 IV. CHINO HILLS HAS A CONSTITUTIONALLY PROTECTED RIGHT TO

16 COMPLETE THE PROJECT

17 Pursuant to legislative grant, Chino Hills has the
18 statutory right to construct the Pipeline Project in Chino's
19 streets. PUC § 10101 provides that:

20 "There is granted to every municipal corporation of the
21 State the right to construct, operate, and maintain water
22 and gas pipes, mains and conduits, electric light and power
23 lines, telephone and telegraph lines, sewers and sewer
24 mains, all with the necessary appurtenances, across, along,
25 in, under, over, or upon any road, street, alley, avenue,
26 or highway, and across, under, or over any railway, canal,
27 ditch, or flume which the route of such works intersects.

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1 crosses, or runs along, in such manner as to afford
2 security for life and property."

3 Upon acceptance, this legislative grant results in a
4 constitutionally protected contract right. (See, Russell v.
5 Sebastian (1914) 233 U.S. 195 (holding that a city ordinance
6 requiring a city grant prior to excavation violated the contract
7 formed pursuant to the predecessor statute to PUC § 10101).
8 Analyzing this predecessor statute, the United States Supreme
9 Court struck down a Los Angeles city ordinance which restricted
10 the installation of an underground gas distribution system below
11 the city's streets. The Supreme Court held that the legislative
12 grant that resulted from acceptance of the state's offer
13 constituted a contract protected by the federal constitution.
14 (Russell v. Sebastian (1914) 233 U.S. 195, 205.) As for
15 applicable terms and conditions, the Court deferred to the
16 statutory language stating "[t]he people of the state decided
17 that local superintendence of the execution of the work,
18 regulations and indemnity with respect to damages . . . would be
19 adequate protection." (Id. at 207.)

20 In a case virtually identical to the present facts, the
21 California Supreme Court has similarly upheld the existence of a
22 constitutionally protected contract right. (City of Beverly
23 Hills v. City of Los Angeles (1917) 175 Cal. 311, 315.) Los
24 Angeles designed and sought to construct an underground water
25 pipeline to bring water from the San Fernando Valley under the
26 streets of Beverly Hills to the city of Los Angeles. Beverly
27 Hills sought to enjoin the pipeline construction entirely or to
28 limit it to the portions already completed.

1 The Court rebuffed this attempt, concluding that Beverly
2 Hills "clearly could not, after a part of such line had been
3 installed, revoke the grant or add thereto new conditions and
4 restrictions the effect of which might be to nullify and render
5 the grant made wholly inoperative." (Id.) In this matter
6 before this court, Chino Hills and Chino discussed the pipeline
7 project for over three years, Chino Hills submitted design
8 plans, plans were revised per Chino's request, plans were then
9 approved by Chino and construction on a portion of the pipeline
10 completed. Once Chino Hills completed Phase 1 of the Pipeline
11 Project at the intersection of East End and Chino Avenues, Chino
12 cannot now revoke its permission or add new or different
13 conditions to the construction of Phase 2.

14 **V. THE COURT SHOULD IMPOSE THE REASONABLE TERMS AND CONDITIONS**
15 **PREVIOUSLY AGREED TO BY CHINO WHICH WILL ALLOW CHINO HILLS TO**
16 **CONSTRUCT THE PROJECT**

17 **A. PUC § 10102 Identifies the Limited Terms and Conditions**
18 **that Can Be Applied to the Completion of the Pipeline**
19 **Project**

20 As for the extent of the statutory grant, the only
21 limitation upon Petitioner is the requirement that the street be
22 restored to its former state and that the project be located so
23 as to minimize any interference with existing uses. (See,
24 Beverly Hills, supra, 175 Cal. at 315.) PUC § 10102 provides:

25 "A municipal corporation exercising its rights under
26 this article shall restore the road, street, alley, avenue
27 [etc.] so used to its former state of usefulness as nearly
28 as may be, and shall locate its use so as to interfere as

1 little as possible with other existing uses of the road,
2 street, alley, avenue [etc]."

3 Though Respondent has agreed to the route under East End
4 Avenue and the design of the construction, Respondent now seeks
5 to impose additional and unrelated conditions upon the issuance
6 of an encroachment permit. Not only is this attempt an
7 unconstitutional interference with Petitioner's vested contract
8 rights, it is patently unfair and unreasonable, particularly
9 because of the completion of Phase 1 at Respondent's request and
10 the design of the Interconnect.

11 **B. The Court Should Impose Upon Phase 2, the Same Terms and**
12 **Conditions as Established for Phase 1**

13 In the case of an impasse, PUC § 10104 empowers the Court
14 to determine the terms and conditions under which the Pipeline
15 Project will proceed. PUC § 10104 provides, in part, that if
16 the two cities are unable to agree on the terms and conditions
17 and location of a use within three months of a proposal to do
18 so, the city seeking the right of way can seek redress from the
19 Superior Court, which will determine and adjudicate the terms
20 and conditions to which the use of the right of ways is to be
21 permitted.

22 Terms and conditions were agreed to for the construction of
23 the entire project. These terms and conditions were in full
24 force and followed during the construction of Phase 1. When
25 Chino Hills attempted to complete Phase 2, pursuant to the
26 established terms and conditions, Chino refused Chino Hills
27 access to its right of ways. Instead Chino is attempting to
28 link unrelated terms and conditions and seeks to impose an

1 indefinite and continuing obligation on Chino Hills. Because of
2 this impasse Chino Hills has been forced to seek redress from
3 this court.

4 1. Petitioner Has Made a Request of Respondent to Follow
5 the Agreed Upon Terms and Conditions

6 There is only one statutory prerequisite in order for Chino
7 Hills to construction its Pipeline Project. PUC § 10103
8 requires Chino Hills to make a request of Chino to agree to the
9 location and terms and condition of the use. PUC § 10103.

10 This requirement that a municipality must make a proposal
11 has been interpreted as:

12 "The act in question merely contemplates that a request to
13 agree upon the terms and conditions of the proposed use
14 should be made and that the municipality in which the
15 proposed use is to occur should thereafter have an
16 opportunity, during the prescribed three month period which
17 follows, to negotiate upon the terms and conditions of the
18 proposed use." (City of Los Angeles v. City of Huntington
19 Park (1939) 32 Cal.App.2d 253, 265.)

20 There is no dispute or controversy regarding the location
21 of the use. Chino has been involved in the planning process for
22 the Pipeline Project and has agreed to the location of the use.
23 Indeed, Chino even required Chino Hills to design the
24 Interconnect and construct Phase 1 of the Pipeline Project out
25 of sequence to accommodate a Chino public works project at the
26 intersection of East End Avenue and Chino Avenue at a cost
27 exceeding \$500,000. Chino Hills complied with these terms
28 requests.

1 Chino has now created a controversy concerning the terms
2 and conditions under which Phase 2 of the Project should be
3 completed. Chino Hills believes that the terms and conditions
4 should be those previously agreed upon and implemented for Phase
5 1; i.e., payment of the permit fee and a guaranty that the right
6 of way will be returned to its prior condition. Chino, on the
7 other hand, has sought to link its consent to the remainder of
8 the project to the satisfaction of unrelated and impossible
9 conditions. Indeed, Chino has ignored two permit applications
10 submitted by Chino Hills' representatives on August 22, 2000 and
11 July 12, 2001, and enacted the Amended Ordinances on an
12 artificially exigent basis purporting to change the requirements
13 for issuance of permits.

14 **2. The Court May Impose Reasonable Terms and Conditions**
15 **for the Remainder of the Project if Necessary**

16 PUC § 10102 provides the Court with guidance as to the
17 nature and manner of the terms and conditions which should be
18 applied—**safety and restoration**. The right to occupy "has always
19 been understood to be subject to the obligation to restore the
20 surface of the street to its original condition." (In the
21 Matter of the Application of Keppelmann (1914) 166 Cal. 770,
22 774.)

23 The customary terms and conditions of "security to life and
24 property" and restoration of the property "to as near as may be
25 to its former state or so as not to have impaired unnecessarily
26 its usefulness" is repeated throughout the California Water
27 Code. [See Water Code §§ 22431 (irrigation districts), 31060
28 (county water districts), 35603 (California water districts),

1 43153 and 43154 (water storage districts), 55377 (county water
2 works districts) and 71695 (municipal water districts).
3 Additionally, similar statutory grants apply to county
4 sanitation districts (Health & Saf. Code § 4759), municipal
5 utility districts (PUC § 12808), and public utility districts
6 (PUC § 16464).

7 "The statutory grants are fairly uniform in providing
8 that the right be exercised in the public road in such a
9 manner as to secure persons and property against injury and
10 that the public roads be restored as nearly as possible to
11 their former state." (Stanley Mosk, Opinion No. 61-257
12 (7/10/62) 40 Attorney General's Opinions 15, 17.)

13 "It would seem a reasonable regulation of the exercise
14 of the public district's statutory right is not contrary to
15 the statutory grant as long as there is no discretion in
16 the county to deny a permit to a qualified district that
17 has met the permit requirement applicable to any district,
18 public utility, or other person having a right to excavate
19 in such roads." (Id. at 18; emphasis added.)

20 Here, Respondent seeks unlawfully to impose conditions
21 which effectively preclude completion of the Pipeline Project.
22 Anything more than reasonable time, place and manner
23 restrictions to provide notice to Chino are impermissible. An
24 ordinance which makes the legislative grant "subject to the
25 discretion of city officials is clearly open to the objection
26 that it imposes an unwarranted limitation upon the
27 constitutional grant." (Keppelmann, supra, at 774.)

28 ///

1 general laws." "A local municipal ordinance that is in conflict
2 with a general law adopted by the Legislature is invalid if it
3 attempts to impose additional requirements in a field that is
4 preempted by the general law." (Agnew v. City of Los Angeles
5 (1958) 51 Cal.2d 1, 5.) "When there is a doubt as to whether an
6 attempted regulation relates to municipal or to a state matter,
7 or if it be the mixed concern of both, the doubt must be
8 resolved in favor of the legislative authority of the state.
9 (Abbott v. City of Los Angeles (1960) 53 Cal.2d 674, 681.)

10 Indeed, the court in Baldwin Park County Water Dist. v.
11 County of Los Angeles (1962) 208 Cal.App.2d 87 enjoined the
12 County of Los Angeles from enforcing an ordinance purporting to
13 regulate water storage and transmission. Rejecting an argument
14 that the ordinance in question was a valid assertion of local
15 police power, the court held the county ordinance was in
16 conflict with state legislation because:

17 "The Water Code shows an intention by the Legislature to
18 adopt a general and complete scheme and plan for conserving
19 water, and regulating the production, control,
20 distribution, and use of water by such water districts as
21 those involved herein. The trial court properly concluded
22 that the state has occupied the legislative field with
23 respect to the subject of water conservation and regulation
24 by irrigation districts and by county and California water
25 districts; and properly concluded [the ordinance] is not
26 applicable to plaintiffs."

27 (Baldwin Park County Water Dist. v. County of Los Angeles,
28 supra, 208 Cal.App.2d at 97.)

1 In contrast with this specific exclusion, it should be
2 noted that there is no constitutional or statutory authority
3 authorizing Respondent to require a permit from Petitioner.
4 There is no provision in the Streets and Highways Code
5 authorizing cities to require permits for openings, excavations
6 or encroachments.⁶ "Where a statute, with reference to one
7 subject contains a given provision, the omission of such
8 provision from a similar statute concerning a related subject is
9 significant to show that a different intention existed."

10 (Penasquitos, Inc. v. Superior Court (1991) 53 Cal.3d 1180,
11 1189, quoting People v. Valentine (1946) 28 Cal.2d 121, 142.)

12 Further, the Amended Ordinances now purport to require
13 every applicant to agree to "compensate the City of Chino for
14 "direct or indirect" environmental damage caused by the
15 construction." In addition, the Ordinance requires cities to
16 enter into an agreement with the Chino prior to the issuance of
17 an encroachment permit. (Section (e).) Pursuant to this latter
18 clause, Respondent presented Petitioner with the "Agreement for
19 Issuance of an Encroachment Permit to Construct a Water
20 Pipeline" (Exhibit 29) which illustrates the arbitrary and
21 capricious nature of Respondent's conduct and of the Amended
22 Ordinances.

23 Not only are the provisions of the Urgency Ordinance
24 unreasonably vague so as not to put an applicant on notice of
25 the nature and extent of potential liability, but it arguably

26 _____
27 ⁶ This lack of express authority is particularly noteworthy when contrasted
28 with the authorization the legislation has imparted to counties and to the
State Department of Highways (Streets and Highways Code §§ 1460 and 670) to
require an encroachment permit under similar circumstances, and with the PUC
§ 10101 statutory grant to Petitioner.

1 creates a perpetual obligation or liability on a permit
2 applicant. This flaunts ordinary custom and practice and
3 impermissibly permits Chino to impose arbitrary and capricious
4 requirements on the issuance of a permit. (See Keppelmann,
5 supra.)

6 **VII. CONCLUSION**

7 Petitioner respectfully requests that the Court order
8 forthwith that construction of the Pipeline can proceed
9 immediately subject only to the following two terms and
10 conditions:

11 (1) Chino Hills must restrict project construction hours
12 within Chino to Monday through Friday between 7:00 a.m. and 5:00
13 p.m. With respect to cross streets that have significant
14 traffic flows during peak hours, Chino Hills will further
15 restrict construction hours from 9:00 a.m. to 3:00 p.m.

16 (2) Chino Hills is responsible for any and all damages
17 caused to Chino's rights of ways or adjacent properties that is
18 directly caused by construction activities for the project.

19 (3) Chino Hills will indemnify Chino from such damage
20 claims caused by the construction activities and will repair the
21 roads as near as is possible to their former state.

22 Petitioner further requests that the Court issue an order
23 directing Respondent's City Engineer and Director of Public
24 Works to issue permits for the construction subject only to the
25 conditions described above.

26 ///

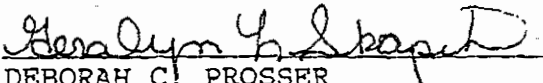
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1 Petitioner further requests that the Court determine that
2 Respondent's Urgency Order is preempted, unconstitutional and
3 invalid.

4 DATED: December 6, 2001

MARK HENSLEY, CITY ATTORNEY
CITY OF CHINO HILLS; and
BURKE, WILLIAMS & SORENSEN, LLP

7 By: 
8 DEBORAH C. PROSSER
9 GERALYN L. SKAPIK
10 MARK J. MULKERIN
11 Attorneys for Petitioner
12 CITY OF CHINO HILLS

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6 Attorneys for CITY OF CHINO HILLS

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN BERNARDINO - WEST

11 CITY OF CHINO HILLS,
12 Petitioner,
13 vs.

Case No:

VERIFIED PETITION FOR WRIT OF
MANDATE PURSUANT TO C.C.P. §
1085; AND REQUEST FOR DECLARATORY
RELIEF PURSUANT TO PUBLIC
UTILITIES CODE §10101, et seq.

14 CITY OF CHINO, CITY COUNCIL
FOR CITY OF CHINO, DIRECTOR
15 OF PUBLIC WORKS FOR CITY OF
CHINO, CITY ENGINEER FOR CITY
16 OF CHINO, and DOES 1 through
100, inclusive,

[REQUEST FOR SPECIAL ASSIGNMENT
TO HON. J. MICHAEL GUNN, DEPT. 8,
SAN BERNARDINO SUPERIOR COURT,
PURSUANT TO JUDGMENT IN RCV 51010
AND PEACE AGREEMENT]

17 Respondents.

[Filed concurrently herewith:
Petitioner's Brief in Support;
Request For Judicial Notice;
Declarations of Cindy Miller,
Mike Kapanpour, Mike Maestas,
Doug LaBelle, Anne Tanner, Mark
Hensley and Mark Trautwein;
Notice of Lodgment of Exhibits 1-
36; and Notice of Lodgment of
Cases]

24 GENERAL ALLEGATIONS

25 Petitioner, City of Chino Hills ("Petitioner", or "Chino
26 Hills") hereby brings this Writ of Mandate and request for
27 judicially imposed terms and conditions as against Respondents,
28 and each of them as follows:

1 1. Petitioner, Chino Hills, is a general law city within
2 the meaning of Section 34102 of the Government Code duly
3 organized and existing under the laws of the State of
4 California. Chino Hills was incorporated in December, 1991, and
5 is located entirely within the County of San Bernardino in the
6 State of California.

7 2. Petitioner is informed and believes and thereon
8 alleges that Respondent City of Chino ("Chino" or "Respondent"),
9 is a general law city within the meaning of Section 34102 of the
10 Government Code duly organized and existing under the laws of
11 the State of California. Chino was incorporated in 1910 and is
12 located entirely within the County of San Bernardino in the
13 State of California.

14 3. Petitioner is informed and believes and thereon
15 alleges that Respondent Chino's City Council is its governing
16 body authorized to conduct business, enter into contracts, and
17 adopt legislation on its behalf.

18 4. Petitioner is informed and believes and thereon
19 alleges that Respondents Chino's City Engineer and Director of
20 Public Works are charged in their official capacities with the
21 responsibility of reviewing and granting or denying applications
22 for encroachment permits.

23 5. Petitioner is ignorant of the true names of
24 respondents sued herein as Does 1 through 100, inclusive, and
25 therefore sues these respondent by such fictitious names.
26 Petitioner, will amend this Writ to allege their true names and
27 capacities when ascertained. Petitioner is informed and
28 believes and thereon alleges that each of the fictitiously named

1 respondents is responsible in some manner and herein alleged.

2 JURISDICTION AND VENUE

3 6. This San Bernardino Superior Court has original
4 jurisdiction on this petition for writ of mandate pursuant to
5 Code of Civil Procedure Section 1085. Petitioner and Respondent
6 are both cities located within the County of San Bernardino.
7 Pursuant to Public Utilities Codes §§10101 et seq., the Superior
8 Court has original jurisdiction to resolve conflicts relating to
9 granting of rights of way between municipalities for purposes of
10 installing utilities, including water lines.

11 7. Venue for this action lies in the San Bernardino
12 Superior Court, Dept 8, before the Honorable J. Michael Gunn,
13 the designated judge to hear all disputes among water producers
14 relating to the Chino Basin, pursuant to the Article IV,
15 paragraph 15 of the final judgment in the case entitled Chino
16 Basin Municipal Water District vs. City of Chino, et. al, San
17 Bernardino Superior Court Case No. 164327, now designated No.
18 RCV 51010 (the "Judgment" (Exh. 1)¹) and further pursuant to
19 Article X of the Rules and Regulations which is the implementing
20 document ("Rules", Exh. 2) to a binding agreement known as the
21 Chino Basin Peace Agreement (the "Peace Agreement" Exh. 3)
22 entered into to further carry out the intent of the Judgment and
23 the Chino Basin Optimum Basin Management Program ("OBMP" Exh.
24 4). Venue is proper before the Hon. J. Michael Gunn on the
25 following grounds:

26 (a) The Judgment, Rules and the Peace Agreement are
27

28 ¹ All Exhibits are attached to the Notice of Lodgment of Exhibits in Support
of Petition for Writ of Mandate and Request for Declaratory Relief.

1 binding upon Petitioner and Respondent as signatories to the
2 Peace Agreement. Both Petitioner and Respondent are members of
3 the class of water producers identified in the Judgment and
4 Peace Agreement known as the Appropriative Pool;

5 (b) The Judgment, Rules and Peace Agreement recognize
6 the right of each producer to produce both the quantity and
7 quality of water to meet its water supply needs to the greatest
8 extent possible from the water that underlies the producer's
9 area of benefit (Exh. 3, Recitals, p.1);

10 (c) In this petition for writ of mandate and for
11 declaratory relief, Chino Hills seeks to enforce its right as a
12 water producer against Chino to produce both the quantity and
13 quality of water to meet its water supply needs, as covenanted
14 and protected by the Judgment, Rules and the Peace Agreement.

15 PRELIMINARY STATEMENT

16 8. This action seeks the issuance of a writ of mandate to
17 compel Respondent to cease and desist from unlawfully
18 interfering with Petitioner's fundamental right to supply
19 adequate drinking water to its residents. Chino Hills
20 possesses, by operation of law, a legislative grant that allows
21 it to construct water pipelines in Chino's streets. Petitioner
22 is authorized through statutory mandate pursuant to Public
23 Utility Code §10101, et seq., subject only to Respondent's
24 ability to regulate the time, place and manner of the
25 encroachment. Respondent, however, has unlawfully sought to
26 impose burdensome and unrelated terms and conditions prior to
27 issuing the encroachment permits.

28 9. The pipeline at issue will transport water essential

1 to Chino Hills. In December 1995, the California Department of
2 Health Services (the "DHS") issued a compliance order suspending
3 Chino Hills' ability to add new water service connections to its
4 water system, in effect halting new development and construction
5 in Chino Hills. The DHS order was based in part upon the
6 premise that Chino Hills' water system had insufficient capacity
7 to meet the maximum daily demands placed upon it. To address
8 the DHS's order, Chino Hills has leased additional water
9 supplies from Monte Vista Water District ("MVWD"), whose water
10 supply is located in the City of Montclair. To access this
11 water source, however, Chino Hills must lay a pipeline from
12 Montclair, through Chino, to Chino Hills ("Pipeline Project").

13 10. For the past three years, Chino has approved and
14 acknowledged the right of Chino Hills to construct the Pipeline
15 Project through Chino's rights of ways. In reliance upon
16 Chino's approval, Chino Hills has expended substantial amounts
17 of moneys to satisfy conditions imposed by Chino on the Pipeline
18 Project. These conditions included, without limitation,
19 commencement of a portion of the Project and construction of a
20 segment in advance of Chino Hills' contemplated construction of
21 the entire project, re-designing the pipeline to place an
22 interconnection for use by Chino, and re-routing the pipeline to
23 Chino's preferred route.

24 11. Notwithstanding Chino's requests that Chino Hills
25 could and should construct the pipeline and the concessions made
26 by Chino Hills in this process, Respondent has in the past
27 several months reneged on its prior agreement to allow the
28 Pipeline Project. Chino has engaged in a general pattern and

1 practice of unlawful conduct to deny Petitioner access to
2 Chino's right of ways to construct the Pipeline Project,
3 including, without limitation, the following:

4 (a) Chino has injected into the permit application
5 process an unrelated longstanding dispute between Chino and
6 Chino Hills relating to a substantial soil subsidence problem
7 within the southern portion of the City of Chino. Both Chino
8 and Chino Hills own deep and shallow drinking water wells in
9 this area, and Chino has contended for many years that Chino
10 Hills' deep wells have caused large pockets of soil subsidence,
11 a contention which Chino Hills disputes (the "Subsidence
12 Dispute".) The Subsidence Dispute is properly the subject of
13 the exclusive dispute mechanism contained in the Peace Agreement
14 (§ IX. Conflicts, pps. 53-57.) Notwithstanding, Chino has
15 demanded that Chino Hills cease certain deep well production in
16 the vicinity of the subsidence as a condition to an agreement to
17 allow completion of the Pipeline Project.

18 (b) Chino has amended its local encroachment permit
19 ordinance by enacting Urgency Ordinance 2001-08 (Exh. 5) and
20 Ordinary Ordinance 2001-09 (Exh. 6) in August and September,
21 2001, respectfully (the "Amended Ordinances.") These newly
22 enacted Amended Ordinances, *inter alia*, target municipalities
23 seeking an encroachment permit by requiring the municipality to
24 (1) enter into an "agreement" with Chino, the terms of which are
25 at Chino's discretion; and (2) sign a sweeping indemnity/hold
26 harmless certification to be liable for remediation costs for
27 all "direct and indirect" "environmental damage". Although the
28 term "environmental damage" *per se* is not defined in the

1 Ordinances, the Urgency Statement contained in the Urgency
2 Ordinance expressly references the "DeSalter Facility," as the
3 impetus for enacting the Amended Ordinances. The DeSalter
4 Facility is one of several major water works projects provided
5 for by the OBMP to solve the Chino Basin area wide water
6 disputes. The Amended Ordinances impermissibly link the
7 issuance of an encroachment permit to the applicant undertaking
8 liability for "environmental damage" caused by the pumping of
9 wells throughout the entire Chino Basin.

10 12. The Amended Ordinances further improperly seek to
11 subvert the Peace Agreement which already provides for a process
12 for adjudication of, *inter alia*, the Subsidence Dispute, water
13 disputes, or disputes concerning the DeSalter Facility between
14 water producers, including Chino and Chino Hills.

15 13. Accordingly, the Amended Ordinances illegally deny
16 Chino Hills its basic right to obtain water and should be
17 invalidated. Chino is seeking to coerce Chino Hills, as a
18 condition for granting the encroachment permit, to give up water
19 supplies guaranteed under the Judgment and Peace Agreement and
20 to indemnify Chino on the Subsidence Dispute. The actions and
21 conduct of Chino to illegally deny Chino Hills its basic right
22 to obtain water should and must be immediately curtailed.

23 FACTUAL ALLEGATIONS

24 14. Upon its incorporation in December 1991, Chino Hills
25 assumed control of the supply of drinking water to its
26 residents. In accordance with the Judgment, Chino Hills met its
27 water demands through the use of imported water obtained from
28 the Water Facilities Authority ("WFA") (in the amount of 10.68

1 million gallons per day ("MGD")) and 11 local groundwater wells
2 (10 of which are located in Chino) in the amount of 8.66 MGD.

3 15. In December 1995, the State of California Department
4 of Health Services (the "DHS") issued a compliance order to
5 Chino Hills ("DHS Order" Exh. 7) for, *inter alia*, not having
6 sufficient maximum daily capacity for meeting its maximum daily
7 needs. At that time, Chino Hills had an average daily water
8 demand of between 12 and 12.50 MGD and a maximum daily demand of
9 24.3 MGD in August of 1995.

10 16. In order to address future growth and satisfy the DHS
11 Order, Chino Hills developed and implemented the Master Plan of
12 Water Supply dated July 1996 (Exh. 8), the Water System Master
13 Plan dated July 1996 (Exh. 9), and the Program Environmental
14 Report for the City-Wide Master Plans of Water Supply and Water
15 Distribution (EIR #97-01) (collectively the "Water Plans"). The
16 Water Plans accounted for projected development and population
17 growth and accommodated ultimate average daily and maximum daily
18 demands of 20.8 MGD and 41.6 MGD, respectively. Chino Hills
19 could meet these goals through increasing its use of imported
20 water from the WFA.

21 17. The Water Plan identified several alternative new
22 water supplier sources in order to continue meeting future and
23 ultimate water demands for Chino Hills. One solution was to
24 increase the quantity of water leased from the MVWD which
25 required the installation of a larger capacity pipeline.

26 18. As part of the California Environmental Quality Act
27 ("CEQA") process, Chino Hills prepared a draft environmental
28 impact report regarding impacts of these potential new water

1 supply sources, published it for public comment, and held public
2 hearings. Chino received the report and made comments. On or
3 about May 26, 1998, Chino Hills filed a Notice of Determination
4 (Exh. 10) which certified a Final Environmental Impact Report
5 ("FEIR") and adopted findings and alternatives for additional
6 water supplies for Chino Hills recommended in the Water Plan.
7 Chino never challenged the FEIR, which currently remains in full
8 force and effect.

9 19. To meet the projected water needs for Chino Hills, the
10 FEIR adopted, *inter alia*, a priority construction project
11 entitled "Monte Vista Interconnect Transmission Main" (the
12 "Pipeline Project"). In May 1998 Chino Hills City Council
13 approved the Water Plan by passing Resolution 98R-34 (Exh. 11).
14 In July 1998, Chino Hills entered into an agreement with MVWD to
15 lease an additional 10 MGD of water from the WFA System to meet
16 its water needs which required the completion of the Pipeline
17 Project (Exh. 12).

18 20. The Pipeline Project entailed construction of more
19 than six miles of 42 and 30 inch domestic water pipeline
20 underground through three jurisdictions. The Pipeline Project
21 is designed to deliver groundwater from the Monte Vista Well
22 Fields, located in the City of Montclair, to Chino Hills, under
23 public right of ways located through Montclair, County of San
24 Bernardino and Chino. The FEIR proposed four alternative routes
25 for the Pipeline, including East End Avenue running through
26 Chino.

27 21. Following the adoption of the FEIR in May, 1998, and
28 continuing through October, 2001, authorized representatives of

1 Chino Hills communicated regularly both orally and in writing
2 with key staff employees from Chino to discuss the
3 implementation of the Pipeline Project. These communications
4 include, but are not limited to, the following:

5 (a) Oral communications at the area-wide Utility
6 Coordination Committee meetings held on June 16, 1999, September
7 30, 1999, January 26, 2000, May 3, 2000, August 9, 2000,
8 November 5, 2000, and February 14, 2001, all of which were
9 attended by representatives from both Chino Hills and Chino;

10 (b) Oral communications at meetings directly between
11 representatives of Chino Hills and Chino convened expressly to
12 discuss implementation of the Pipeline Project held on November
13 1, 1999, May 9, 2000, August 9, 2000, January 11, 2001, July 11,
14 2001, August 2, 2001, August 28, 2001, September 6, 2001, and
15 October 1, 2001;

16 (c) Written communications between representatives
17 from Chino Hills and Chino discussing the implementation of the
18 Pipeline Project dated October 19, 1998 (Exh. 13); May 25, 1999
19 (Exh. 14); April 20, 2000 (Exh. 15); August 10, 2000 (Exh. 16);
20 August 9, 2000 (Exh. 17); August 22, 2000 (Exh. 18); January 10,
21 2001 (Exh. 19); January 11, 2001 (Exh. 20); February 26, 2001
22 (Exh. 21); July 12, 2001 (Exh. 22); July 30, 2001 (Exh. 23);
23 September 10, 2001 (Exh. 24); September 11, 2001 (Exh. 25);
24 October 3, 2001 (Exh. 26); October 5, 2001 (Exh. 27); October 8,
25 2001 (Exh. 28); October 8, 2001 (Exh. 29); October 9, 2001 (Exh.
26 30); October 11, 2001 (Exh. 31); and October 16, 2001 (Exh. 32).

27 22. Through these oral and written communications, Chino
28 Hills and Chino entered into an agreement to implement the

1 Pipeline Project (the "Pipeline Agreement"), which included,
2 without limitation, the following terms and conditions:

3 (a) The Pipeline Project to be constructed by Chino
4 Hills would be a domestic 42 inch water pipeline placed
5 underground below East End Avenue within Chino and portions of
6 unincorporated San Bernardino County in a North-South direction
7 from the City of Montclair to Schaefer Avenue where the pipeline
8 continued east below Schaefer Avenue;

9 (b) Chino agreed to accept \$4,063.81 as a permit fee
10 for the Pipeline Project encroachment permit;

11 (c) At Chino's request, Petitioner agreed to an
12 advanced Phase 1 for the Project, namely, to expedite
13 construction of one segment of the Pipeline Project below the
14 intersection of Chino Avenue and East End Avenue to accommodate
15 Chino's timing on a street widening project for Chino Avenue
16 ("Phase 1"). Chino further requested that Chino Hills design
17 for Chino a 20 inch interconnection into the 42 inch pipeline at
18 the intersection of East Avenue and Schaefer Avenue (the
19 "Interconnect"). The purpose of the Interconnect was for Chino
20 to access water from the Pipeline in case of future emergencies.

21 (d) Chino issued an encroachment permit for Phase 1
22 only to Chino Hills' contractors for the advance segment of the
23 Pipeline Project at the intersection of East End and Chino
24 Avenues upon terms and conditions that related only to time,
25 place and manner. This encroachment permit for Phase 1
26 contained entirely different conditions than those which Chino
27 is currently seeking to impose on Chino Hills for the completion
28 of the Pipeline Project.

1 23. In accordance with the terms and conditions of the
2 Pipeline Agreement, Chino Hills undertook the following actions:

3 (a) In or about May, 2001, Chino Hills completed
4 Phase 1 of the Pipeline Project, as described above. Chino
5 Hills expended approximately \$500,000 in completing the Phase 1,
6 including payments to its design professionals RBF Consulting
7 ("RBF") and S.A. Associates for plans, to Kay Construction, T.A.
8 Rivard Incorporated, Norstar Plumbing & Engineering, and
9 Imperial Paving Inc. for construction, and to third parties for
10 various fees (Exh. 33);

11 (b) On or about March 8, 2000, June of 2000 and again
12 on August 22, 2000, RBF prepared and sent to Chino a detailed
13 draft sets of Submittal Plans for Phase 2 of the Project,
14 namely, the completion of the Pipeline Project along East End
15 and Schaefer Avenues ("Phase 2") (Exh. 18). On or about January
16 10, 2001, Chino provided a full set of comments to the 3rd set
17 of RBF Submittal Plans, which concurred with an instruction that
18 the Chino Hills contractor must obtain the necessary permits
19 from Chino for construction (Exh. 18);

20 (c) RBF on behalf of Chino Hills obtained
21 encroachment permits from both the City of Montclair and the
22 County of San Bernardino for the portions of the Pipeline that
23 are to run through their respective jurisdictions. Montclair
24 and the County of San Bernardino issued the permits on limited
25 conditions such as time of construction, compliance with
26 standard construction specifications, restoration of right of
27 ways, and a limited indemnity provision in case of damages
28 the right of ways occurring during construction;

1 (d) RBF on behalf of Chino Hills also obtained
2 encroachment permits or approvals for the Pipeline Project from
3 (a) Cal Trans; (b) Inland Empire Utilities Agency; (3) Union
4 Pacific Railroad Company; (4) Southern California Gas Company;
5 (5) GTE; (6) Century Communications; and (7) Southern California
6 Edison.

7 (e) On or about May 23, 2001, Chino Hills executed a
8 binding contract for construction of Phase 2 of the Pipeline
9 Project with contractor Trautwein Construction ("Trautwein") in
10 the amount of \$3,727,287.00 (the "Trautwein Contract") (Exh.
11 34);

12 (f) On or about August 22, 2000, RBF on behalf of
13 Chino Hills submitted a pre-application for an encroachment
14 permit for Phase 2 of the Project under the then existing Chino
15 encroachment permit Ordinance 88-10 (Exh. 36);

16 (g) On or about July 12, 2001, Trautwein on behalf of
17 Chino Hills submitted an encroachment permit application to
18 Chino for Phase 2 of the Pipeline Project (Exh. 22) under the
19 then existing Chino encroachment Ordinance 88-10 ("Phase 2")
20 (Exh. 22).

21 24. Throughout the period that Chino Hills and its
22 engineers and contractors took these actions in reliance upon
23 the Pipeline Agreement, Chino never disclosed that it intended
24 to renege on the Pipeline Agreement and refuse to issue the
25 encroachment permit for Phase 2 of the Pipeline Project.
26 Indeed, by all of Chino's statements and actions, Chino
27 represented that it would perform under the Pipeline Agreement
28 and that it would issue a permit for Phase 2 of the Pipeline

1 Project under similar conditions as to time, place and manner,
2 as had been contained in the permit issued for the construction
3 of Phase 1.

4 25. On or about August 21, 2001, Respondent's City Council
5 enacted Urgency Ordinance 2001-08 (the "Urgency Ordinance"),
6 amending Chapter 12.02, Title 12 of the Chino Municipal Code
7 relating to the conditions for issuance of an encroachment
8 permit (Exh. 5). Thereafter, on or about September 18, 2001,
9 Respondent's City Council enacted Ordinance No. 2001-09 amending
10 Chapter 12.02 of the Chino Municipal Code which adopted the
11 Urgency Ordinance (Exh. 6). Both newly enacted Ordinances
12 require municipalities to enter into an agreement with Chino
13 before the permit can issue (Section 2.02.030(e)) and further
14 require the execution of a broad, open ended indemnity
15 certifications to undertake liability for all "environmental
16 damages" directly or indirectly caused by the municipality
17 (Section 12.020.050(c)).

18 26. The Urgency Ordinance amends the prior Chino
19 encroachment permit Ordinance 88-10 (Exh. 36) by adding an
20 urgency provision relating to the operation of the DeSalter
21 Facility, which Chino contends has, together with other well
22 pumping from the Chino Basin, contributed to new subsidence
23 problems in the City of Chino (Exh. 25). As applied to Chino
24 Hills, the Ordinance's reference to the DeSalter Facility links
25 inextricably the issuance of an encroachment permit to the
26 undertaking of liability for any pumping in the Chino Basin
27 which Chino contends contributes to the subsidence problem.
28 (Exh. 25).

1 27. The Subsidence Dispute is, however, within the
2 exclusive jurisdiction of the Hon. J. Michael Gunn, as provided
3 by in the Judgment, Peace Agreement, the Rules, and the OBMP. By
4 linking the issuance of the encroachment permit to indemnity for
5 the Subsidence Dispute, Chino is seeking to circumvent and to
6 unilaterally amend the Judgment, Peace Agreement, the Rules and
7 the OBMP which vest jurisdiction of water production and supply
8 and of the Subsidence Dispute in the Watermaster and the Hon. J.
9 Michael Gunn exclusively.

10 28. The pre-existing encroachment Ordinance 88-10 required
11 only that the permittee indemnify Chino for the cost of
12 restoration of damages to the public right of way; whereas the
13 Amended Ordinances now require that the permittee further
14 indemnify Chino for "the remediation costs of all environmental
15 damage caused directly or indirectly by construction." This
16 indemnity far exceeds any damage that could reasonably result
17 from the issuance of an encroachment permit for Phase 2 of the
18 Pipeline Project and continues without limitation. Ordinance
19 88-10 also set a ten (10) day limit by which an encroachment
20 permit had to be granted.

21 29. Following the enactment of the Amended Ordinances,
22 Chino has sought unilaterally to modify the Pipeline Agreement
23 by adding extraordinarily onerous conditions to the issuance of
24 the permit and linking extrinsic issues and disputes to its
25 issuance. Such conditions include, but are not limited to:
26 (a) Demand that Chino Hills pay \$20,000 to Chino
27 allegedly as reimbursement for property damage caused by ground
28 settlement on Chino Avenue, which Chino alleged had occurred as

1 a result of the Phase 1 project, but which Chino Hills
2 vigorously disputed (Exh. 35);

3 (b) Imposition of new terms and conditions on the
4 Pipeline Agreement as follows (Exh. 25);

5 (i) Chino Hills to provide Chino a portion of
6 the water transmission capacity in the Project without
7 compensation;

8 (ii) Chino Hills and MVWD to enter into an
9 agreement whereby assurances are made to Chino that none of its
10 current well production will be affected by MVWD's production of
11 water from the North end of the Chino Basin;

12 (iii) Chino Hills to cease all "deep" well
13 production in the South end of the Basin to alleviate Chino's
14 subsidence concerns; and,

15 (iv) Chino Hills to agree to be perpetually
16 responsible for any damage caused to Chino's rights-of-way due
17 to the Pipeline Project.

18 (v) Demand that Chino Hills execute a form
19 encroachment application that contained burdensome and
20 oppressive hold harmless provisions that, if executed, would
21 bind Chino Hills in perpetuity for all environmental damages for
22 the Subsidence Dispute.

23 30. Chino Hills has performed all conditions, covenants
24 and terms required of it to be performed pursuant to the
25 Pipeline Agreement, except those for which performance has been
26 excused.

27 31. Chino Hills has refused to accept Chino's unilateral
28 modification to the Pipeline Agreement and has demanded

1 performance by Chino of the original Pipeline Agreement. In
2 addition, Chino Hills has refused to accept any conditions for a
3 Phase 2 encroachment permit that were not contained in the Phase
4 1 encroachment permit, and are not reasonable time, place and
5 manner conditions. Reasonable conditions for the issuance of
6 the Phase 2 encroachment the permit are:

7 (a) Chino Hills will restrict hours of construction
8 to Monday through Friday 7:00 a.m. to 5:00 p.m.; and for streets
9 with significant traffic flow during peak hours, further
10 restriction from 9:00 a.m. to 3:30 p.m.;

11 (b) Chino Hills will accept responsibility for all
12 damages caused to the right-of-way or adjacent properties within
13 Chino which is directly caused by the construction activities
14 for the project; and

15 (c) Chino Hills will indemnify Chino for damages
16 directly caused by the construction activities and will repair
17 the road as is customary for such projects.

18 32. Chino has refused to abide by the Pipeline Agreement,
19 and continues to refuse to issue the permit in accordance with
20 reasonable conditions set forth above, despite attempts by Chino
21 Hills since August 2001 to achieve a resolution with Chino for
22 reasonable conditions for the issuance of the permit.

23 33. Chino has likewise refused to process either the pre-
24 application for permit filed by RBF or the application for
25 permit filed by Trautwein for Phase 2 of the Project. Although
26 both applications were filed while Ordinance 88-10 was in effect
27 (which required action within ten (10) days on an application
28 before the effective date of the newly enacted Amended

1 Ordinances, Chino alleges that said applications are invalid
2 because they were not filed directly by Chino Hills, as
3 allegedly required by the newly enacted Ordinances (see
4 Trautwein Declaration, paragraph 11).

5 34. Because of the delay in obtaining the Phase 2 permit,
6 Chino Hills has been compelled to cancel the Trautwein Contract.
7 Trautwein alleges that, prior to notice of cancellation, it had
8 already committed substantial expenditures in the form of
9 material and equipment orders relating thereon, allegedly
10 totaling \$1.9 million.

11 FIRST CAUSE OF ACTION

12 DECLARATORY RELIEF

13 (AS TO ALL RESPONDENTS)

14 35. Petitioner repeats and realleges each and every
15 allegation contained in paragraphs 1 through 34 as though fully
16 set forth herein.

17 36. Pursuant to Section 10101 of the Public Utilities Code
18 ("PUC"), a legislative grant is bestowed upon Chino Hills to
19 construct, operate and maintain water pipes, all with the
20 necessary appurtenances, on or under any road or avenue which
21 the route of such works intersects, crosses, or runs along in
22 such a manner as to afford security for life and property.

23 37. By operation of law, acceptance of the legislative
24 grant establishes a constitutionally protected contract right.
25 Further, by virtue of the Pipeline Agreement and the conduct of
26 Chino, Respondent has conceded Petitioner's right to install the
27 Pipeline Project under East End Avenue in Chino.

28 38. Pursuant to PUC §10101, Chino Hills and Chino had an

1 agreement for the Pipeline Project on which Chino Hills relied
2 and constructed Phase 1. With respect to Phase 2, Chino has
3 revoked the original terms and conditions of the Pipeline
4 Agreement and has imposed onerous conditions exceeding customary
5 time, place and manner conditions. Chino has refused, and
6 continues to refuse to establish reasonable conditions.

7 39. More than three months have elapsed since Respondent.
8 has refused to abide by the Phase 1 agreement which established
9 reasonable terms and conditions for construction of the Pipeline
10 Project.

11 40. Chino Hills has detrimentally relied upon the Pipeline
12 Agreement, has expended over \$500,000 on the construction of
13 Phase 1 of the Pipeline Project and has irrevocably committed to
14 the expenditures of further large sums of money for Phase 2, by
15 entering into the Trautwein contract in excess of \$3.7 million
16 for the construction of Phase 2 of the Pipeline Project.

17 41. The Pipeline Project is the only reasonable,
18 practicable and feasible method for Chino Hills to obtain its
19 daily allotted water supply from MVWD, and indeed, Chino agreed
20 to the specific route of the Pipeline Project along East End
21 Avenue.

22 42. The Pipeline Project design and construction plans are
23 in complete accord with the best known engineering practices and
24 comply with all rules and safety regulations of Cal Trans and
25 Inland Empire Utility Agency. The proposed construction affords
26 security for life and property and will interfere as little as
27 possible with traffic conditions and other existing street uses.
28 (See Trautwein Declaration, paragraph 5.)

1 43. An actual controversy has arisen and now exists
2 between Petitioner and Respondent concerning their respective
3 rights and duties under PUC §10101, in that Petitioner contends
4 that the burdensome conditions imposed by Respondent in the
5 Pipeline Agreement and through its newly enacted encroachment
6 permit process unreasonably and unlawfully interfere with
7 Petitioner's legislative grant established under PUC §10101.

8 44. Chino Hills desires a judicial determination of its
9 rights and duties pursuant to PUC §10101 and a declaration
10 (1) to enforce the Pipeline Agreement under the terms and
11 conditions set forth in Paragraph 31 above; (2) stating that
12 Respondent's encroachment permit process is unreasonably and
13 unlawfully interfering with Chino Hills' exercise of its
14 legislative grant, and (3) that Chino Hills may enter Chino's
15 right of ways pursuant to PUC §10101 to construct Phase 2 of the
16 Pipeline Project.

17 45. A judicial declaration is necessary and appropriate at
18 this time under the circumstances in order that Chino Hills may
19 ascertain its rights and duties with respect to its legislative
20 grant as to the Pipeline Project and the Court may establish the
21 terms and conditions to govern the construction of Phase 2 of
22 the Pipeline Project.

23 SECOND CAUSE OF ACTION

24 ORDINARY MANDAMUS

25 (AS TO ALL RESPONDENTS)

26 46. Petitioner repeats and realleges each and every
27 allegation contained in Paragraphs 1 through 45 as though fully
28 set forth herein.

1 47. Petitioner brings this cause for ordinary mandamus
2 pursuant to California Code of Civil Procedure §1085 to compel
3 the performance by Chino of its duty under PUC §10101 and to
4 compel Chino to allow Chino Hills the use and enjoyment of its
5 legislative grant under PUC §10101.

6 48. By refusing to allow Chino Hills to enter Chino's
7 right of ways to construct Phase 2 of Pipeline Project, a right
8 granted upon Chino Hills through PUC §10101, Chino has abused
9 its discretion in numerous respects, including, but not limited
10 to (a) failing to proceed in a manner required by law; (b)
11 enacting an ordinance which is arbitrary and capricious, and not
12 supported by fair or substantial reasons; (c) repudiating the
13 original Pipeline Agreement; and (d) refusing to issue the
14 encroachment permit pursuant to Ordinance 88-10 which was in
15 effect on August 22, 2000 and July 12, 2001 when Chino Hills'
16 representatives RBF and Trautwein applied for the permits.

17 49. As a result of Chino's refusal to abide by PUC §10101
18 and failure to issue the Phase 2 encroachment permit, Chino
19 Hills has been and is damaged in that it has been; and will
20 continue to be unable to construct, operate and maintain
21 necessary and essential water pipelines that is the subject of
22 this petition.

23 50. Chino Hills has a beneficial interest in the issuance
24 of a writ of mandamus. As the municipality being denied access
25 to Chino's right of way, Chino Hills' rights and interests have
26 been and will be severely adversely affected, and the grant
27 afforded to it under PUC §10101 will be invalidated.

28 /././

1 51. Chino Hills has no plain, speedy and adequate remedy
 2 in the ordinary course of law for the relief prayed for herein,
 3 because of Chino Hills' need for additional water sources to
 4 meet its immediate needs.

5 52. Accordingly, Chino Hills respectfully requests that
 6 the court issue a writ of mandamus requiring Chino to permit
 7 Petitioner's access to Respondent's right of way so that the
 8 Pipeline Project can be completed, and for the issuance of an
 9 encroachment permit under the reasonable time, place and manner
 10 conditions as alleged above in paragraph 31.

11 THIRD CAUSE OF ACTION

12 INVALIDATION OF ORDINANCES 2001-08 AND 2001-09 DUE TO PREEMPTION

13 UNDER PUBLIC UTILITIES CODE §10101, ET SEQ.

14 (AS TO ALL RESPONDENTS)

15 53. Petitioner repeats and realleges each and every
 16 allegation set forth in paragraphs 1 through 34 as though fully
 17 set forth herein.

18 54. The legislative intent behind PUC §10101, et seq. is
 19 to ensure, through legislative grants, that every municipal
 20 corporation has the right to construct, operate and maintain,
 21 *inter alia*, water lines and conduits with all the necessary
 22 appurtenances, across, along, in, under, over, or upon any road,
 23 street or alley for which the route of such work intersects.

24 55. The language contained in the Amended Ordinances
 25 conflicts with PUC §10101 in that it imposes additional
 26 requirements in a field that is preempted by general state law.

27 56. The conditions contained within the Amended Ordinances
 28 are preempted by PUC §10101 in that they include not only the

1 costs of restoration to the public right-of-ways, but also
2 substantially increased costs for liability to other property
3 and other parties whose property may be damaged and for the
4 remediation costs of all environmental damages caused directly
5 or indirectly by the construction, without limitation and in
6 perpetuity.

7 57. With this language, the Amended Ordinances attempt to
8 place burdensome restrictions upon any party exercising its
9 rights under PUC §10101, et seq. thus prohibiting and
10 restricting the legislative grant afforded to them.

11 58. With the enactment of Amended Ordinances, Chino has
12 enacted legislation, the actual language of which conflicts with
13 previously enacted state law.

14 59. The power delegated to a local body pursuant to
15 Section 11 of Article XI of the State Constitution prevents a
16 local body from enacting legislation within a field that is
17 regulated by the state. Thus, the Constitution prohibits
18 Respondent from imposing additional, more restrictive
19 requirements upon Petitioner when implementing the legislative
20 grant to construct pipelines within Respondent's streets under
21 PUC §10101.

22 FOURTH CAUSE OF ACTION

23 INVALIDATION OF URGENCY ORDINANCE 2001-08

24 AND REGULAR ORDINANCE 2001-09 AS ARBITRARY AND CAPRICIOUS

25 (AS TO ALL RESPONDENTS)

26 60. Petitioner repeats and realleges each and every
27 allegation set forth in paragraphs 1 through 34 as though fully
28 set forth herein.

1 61. Prior to August 2001, Chino's encroachment permit
2 process was typical of that of other municipalities and its
3 Ordinance 88-10 was consistent with PUC §10101.

4 62. The newly enacted Amended Ordinances are arbitrary and
5 capricious in that:

6 (a) They require that any party seeking or requesting
7 to go into Chino's right-of-way warrant that they indemnify
8 Chino against all damages, not only to public right-of-ways, but
9 to other properties and to third parties whose property may be
10 indirectly damaged, as well as pay for all the remediation costs
11 for all environmental damages caused directly or indirectly by
12 the construction without limitation and in perpetuity, including
13 damages related to operation of the DeSalter Facility within the
14 Chino Basin;

15 (b) They were adopted on fabricated emergency basis
16 without the normal legislative measures accorded new ordinances.
17 Petitioner had submitted two previous permit applications for
18 Phase 2 under Ordinance 88-10 (Exhs. 17 and 18), which
19 Respondent has failed to process. After Petitioner completed
20 Phase 1 of the Pipeline Project early at Respondent's request,
21 Respondent vacated Ordinance 88-10 and adopted the Amended
22 Ordinances as a ploy to bar Chino Hills from completing Phase 2;

23 (c) The Amended Ordinances are not supported by a
24 fair or substantial reason, are not based upon consideration of
25 relevant factors, and result from and a clear error in its
26 judgment; and

27 (d) The Amended Ordinances expressly require that
28 applicants which are municipalities enter into an agreement.

1 Respondent presented Petitioner with an agreement containing
2 conditions that would invalidate the Judgment, Peace Agreement,
3 Rules and Regulations; and the OBMP, and included such onerous
4 conditions as to render impossible the completion of the
5 Pipeline Project (Exh. 28).

6 63. Negotiations between Chino Hills and Chino for the
7 construction of the Pipeline Project have been ongoing since
8 1998. For Chino to initiate, implement and adopt the Amended
9 Ordinances requiring burdensome and oppressive conditions which
10 conflict with the intent of PUC §10101, is not supported by
11 fair or substantial reasons, and constitutes an unauthorized
12 course of action. The Amended Ordinances are arbitrary and
13 capricious.

14 FIFTH CAUSE OF ACTION

15 INVALIDATION OF URGENCY ORDINANCE 2001-08

16 AND REGULAR ORDINANCE 2001-09 BASED UPON VAGUENESS AND AMBIGUITY

17 (AS TO ALL RESPONDENTS)

18 64. Petitioner incorporates by reference each and every
19 allegation contained in paragraphs 1 through 34 as though fully
20 set forth herein.

21 65. The Amended Ordinances contain vague and ambiguous
22 language so as the applicant is not apprised and informed as to
23 precisely what terms to which the applicant is being bound.

24 66. The applicant is to sign a statement which reads in
25 part ". . . Finally, I understand and agree to compensate the
26 City of Chino for the cost of restoration and any and all
27 damages to the public right of way, other City property and all
28 other parties whose life or property was damaged, and the

1 remediation costs of all environmental damages caused, directly
2 or indirectly, by my construction as required by Chapter 12.02
3 of the Chino Municipal Code." (Exhs. 5 and 6.)

4 67. This language contained in the encroachment permit
5 statement is overly vague and ambiguous, does not afford the
6 applicant an understanding as to precisely the terms to which
7 the applicant will be bound, is uncertain as to what constitutes
8 "all environmental damages" and as to the meaning of the terms
9 "directly or indirectly".

10 68. Because the language contained in the Amended
11 Ordinances is vague and ambiguous, and places a burden upon the
12 applicant which does not inform the applicant of exactly what
13 the applicant will be bound to, the Ordinance must be declared
14 invalid.

15 69. The Amended Ordinances require applicants which are
16 municipalities to enter into an unspecified and undefined
17 agreement with the City of Chino. This requirements further
18 renders the Amended Ordinances vague and ambiguous.

19 Therefore, Petitioner, Chino Hills, prays as follows:

20 AS TO THE FIRST CAUSE OF ACTION

21 1. For a judicial declaration that: (a) the Pipeline
22 Agreement which applied to Phase 1 of the Pipeline Project
23 applies equally to Phase 2 of the Pipeline Project; (b) that
24 Chino's newly enacted encroachment permit process is
25 unreasonably and unlawfully interfering with Chino Hills'
26 exercise of its legislative grant; and (c) that Chino Hills may
27 enter Chino's right of way pursuant to PUC §10101 to construct
28 its water pipeline system.

1 2. That the following reasonable time, place and manner
 2 restrictions shall govern the construction of Phase 2 of the
 3 Pipeline Project:

4 (a) Chino Hills will restrict hours of construction
 5 to Monday through Friday 7:00 a.m. to 5:00 p.m.; and for streets
 6 with significant traffic flow during peak hours, further
 7 restriction 9:00 a.m. to 3:30 p.m.;

8 (b) Chino Hills will accept responsibility for all
 9 damages caused to the right-of-way or adjacent properties within
 10 Chino which is proximately caused by the construction activities
 11 for the project; and

12 (c) Chino Hills will indemnify Chino for damages
 13 directly caused by the construction activities and will repair
 14 the road as is customary for such projects;

15 AS TO THE SECOND CAUSE OF ACTION

16 1. That the Court issue a preemptory writ in the first
 17 instance commanding respondent, Chino, to permit Chino Hills to
 18 enter its right of ways to allow completion of the Pipeline
 19 Project pursuant to PUC §10101 and for the issuance of an
 20 encroachment permit pursuant to the same conditions set forth
 21 under Ordinance 88-10, under which Phase 1 of the Pipelines
 22 Project was completed; or

23 /././
 24 /././
 25 /././
 26 /././
 27 /././
 28 /././

1 2. That the Court, alternatively, issue an alternative
 2 writ to show cause why Chino should not allow Chino Hills to
 3 enter its right of ways to allow completion of the Pipeline
 4 Project pursuant to PUC §10101 and for issue of an encroachment
 5 permit pursuant to the same conditions set forth under Ordinance
 6 88-10, under which Phase 1 of the Pipelines Project was
 7 completed.

8 AS TO THE THIRD CAUSE OF ACTION

9 1. Invalidate Urgency Ordinance 2001-08 and Regular
 10 Ordinance 2001-09 due to preemption under PUC §10101, et seq.

11 AS TO THE FOURTH CAUSE OF ACTION

12 1. Declare that Urgency Ordinance 2001-08 and Regular
 13 Ordinance 2001-09 are arbitrary and capricious and thus invalid.

14 AS TO THE FIFTH CAUSE OF ACTION

15 1. Declare that Urgency Ordinance 2001-08 and Regular
 16 Ordinance 2001-09 are vague and ambiguous and thus invalid.

17 AS TO ALL CAUSES OF ACTION

18 1. For the cost of this proceeding and for such other and
 19 further relief as the Court deems just and proper.

20 2. For all attorney's fee's associated with the filing of
 21 this petition and obtaining relief thereon.

22 DATED: December 6, 2001 BURKE, WILLIAMS & SORENSON, LLP

23
 24 By: Deborah C. Prosser
 25 DEBORAH C. PROSSER
 26 GERALYN L. SKAPIK
 Attorneys for
 27 CITY OF CHINO HILLS
 28

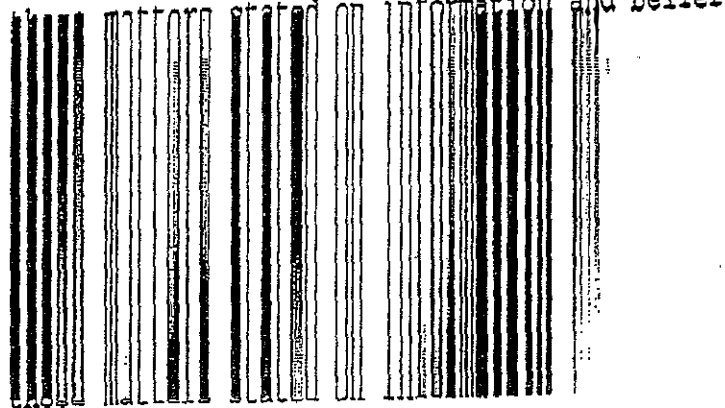
VERIFICATION

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I, Mike Kapanpour, declare that I am employed as the Capital Projects Manager of the City of Chino Hills and, as such, have authority to execute this Verification.

I have read the VERIFIED PETITION FOR WRIT OF MANDATE PURSUANT TO C.C.P. § 1085; AND REQUEST FOR DECLARATORY RELIEF PURSUANT TO PUBLIC UTILITIES CODE § 101010, et seq., and know its contents which are true to my own knowledge, except for

information and belief, and, as to those



matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Verification was executed on December 6, 2001, at Riverside, California.

M. Kapanpour
Mike Kapanpour