

DEPARTMENT OF  
FILED  
FILING FEE EXEMPT  
GOVERNMENT CODE §6103

*C. Kent Wells*

1 MARK D. HENSLEY, CITY ATTORNEY  
DEBORAH C. PROSSER (SBN 109856)  
2 GERALYN L. SKAPIK (SBN 145055)  
MARK J. MULKERIN (SBN 166361)  
3 CITY OF CHINO HILLS; and  
BURKE, WILLIAMS & SORENSEN, LLP  
4 611 West Sixth Street, Suite 2500  
Los Angeles, California 90017  
5 (213) 236-0600; Fax (213) 236-2700  
6 Attorneys for CITY OF CHINO HILLS

7  
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF SAN BERNARDINO - WEST

10  
11 CITY OF CHINO HILLS,  
12 Petitioner,  
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,  
17 Respondents.

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.

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

[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]

18  
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23  
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)<sup>1</sup>)* 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 <sup>1</sup> 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 8, 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 to  
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: 

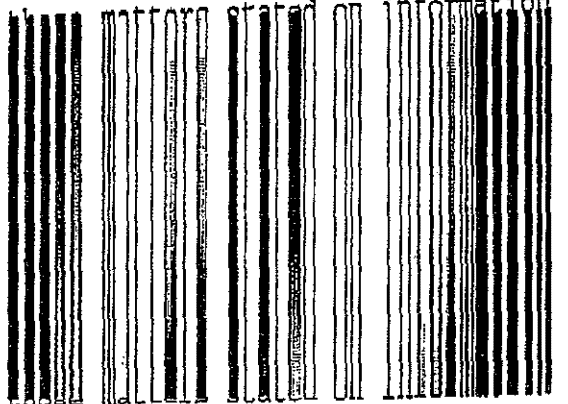
25 DEBORAH C. PROSSER  
 26 GERALYN L. SKAPIK  
 27 Attorneys for  
 28 CITY OF CHINO HILLS

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