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Attorney for: Cucamonga Valley Water District

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SAN BERNARDINO  
RANCHO CUCAMONGA DISTRICT

LAW OFFICES OF  
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CHINO BASIN MUNICIPAL WATER  
DISTRICT,

Plaintiff,

v.

CITY OF CHINO, et al.,

Defendant.

Case No. RCV 51010  
Judge: Hon. J. Michael Gunn

**CUCAMONGA VALLEY WATER  
DISTRICT'S NOTICE OF MOTION AND  
MOTION TO DISCONTINUE THE  
APPOINTMENT OF THE SPECIAL  
REFEREE**

[filed concurrently with Declaration of Jill N.  
Willis in Support of Motion]

Date: August 21, 2008  
Time: 2:00 p.m.  
Dept. R8

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1 NOTICE OF MOTION AND MOTION

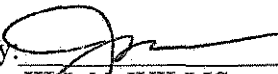
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3 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

4 PLEASE TAKE NOTICE that on August 21 at 2:00 p.m., or as soon thereafter as the  
5 matter may be heard in Department R8 of the above-captioned Court located at 8303 North  
6 Haven Avenue, Rancho Cucamonga, California, Cucamonga Valley Water District will move the  
7 Court for an order discontinuing the appointment of the Special Referee in the above-captioned  
8 matter.

9 This Motion is based on this Notice of Motion, the attached Memorandum of Points and  
10 Authorities, the Declaration of Jill N. Willis filed concurrently, the pleadings, records, and papers  
11 on file in this action, and any other matters properly before the Court at the hearing.

12  
13 Dated: June 30, 2008

BEST BEST & KRIEGER LLP

14  
15 By:   
16 JILL N. WILLIS  
17 Attorney for  
18 Cucamonga Valley Water District

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On December 21, 2007, the Court signed an Order approving the suite of documents that have collectively come to be known as the Peace II measures. As the Court is aware, the parties developed the Peace II measures by engaging in a lengthy collaborative process involving numerous stakeholders, attorneys and technical experts. For more than three years, the parties have dedicated extraordinary amounts of time and resources to this effort. Ultimately, the resulting Peace II measures obtained unanimous support from the interested parties. Notably, many of these parties are local agencies who determined that the Peace II measures are in the best interests of the public they serve.

Cucamonga Valley Water District ("CVWD") believes that the Peace II measures represent a remarkable achievement in Basin management. The hallmark of the Peace II program -- Basin Re-Operation -- marks a paradigm shift in the evolution of groundwater basin management not just in the Chino Basin, but throughout California. Basin Re-Operation moves beyond the primarily reactive programs contained in Watermaster's Optimum Basin Management Program ("OBMP") and provides a mechanism by which the parties can manage the Chino Basin proactively. This proactive management strategy advances the physical solution and maximizes the potential of the Basin to serve as a water supply source, both now and in the future, for the parties to the Judgment and the public at large.

The ability to engage in proactive management through Basin Re-Operation is in large part due to the creation and evolution of the nine-member Board as Watermaster. When the Board was first appointed in 1998, both the Watermaster and the management of the Chino Basin were largely dysfunctional. In the last ten years, the Watermaster has matured into a well-functioning entity that has created an efficient and effective system for managing the Basin and its resources.

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1 The Special Referee and her staff of assistants were originally appointed by the Court to  
2 review a discrete set of questions that were before the Court at a time when the Court could not  
3 rely upon the guidance of its Watermaster and had, in fact, ordered that Watermaster functions be  
4 transferred to the Department of Water Resources. Subsequent to that, the Court utilized the  
5 Referee and her staff to ensure that the newly-appointed Watermaster was able to perform its  
6 duties and obligations under the Judgment. This was ten years ago. With the approval of the  
7 Peace II documentation, and in particular Basin Re-Operation, Watermaster will be poised to  
8 manage the Basin in the manner envisioned by the Judgment. The continued oversight of the  
9 Special Referee and her assistants is thus no longer necessary and, for the reasons detailed herein,  
10 no longer appropriate.

## 11 12 II. BACKGROUND

13 The Judgment in Chino Basin Municipal Water District v. City of Chino, et al., San  
14 Bernardino Superior Court Case No. RCV 51010, was entered in 1978 (“Chino Basin Judgment”  
15 or “Judgment”). The Judgment provides, *inter alia*, for the appointment of a Watermaster to  
16 “administer and enforce the provisions of th[e] Judgment.” (Judgment ¶ 16.) In order to  
17 administer and enforce the Judgment, Watermaster is vested with broad-ranging powers and  
18 obligations, including the ability to employ staff and experts, as necessary, and the power to levy  
19 and collect assessments from stakeholders in the Basin. (See, e.g., Judgment ¶¶ 20, 22.) Further,  
20 Watermaster is granted the discretionary power to develop and implement an ●BMP for the  
21 Basin, including both water quantity and water quality considerations. (Judgment ¶ 41.)

22  
23 Chino Basin Municipal Water District (“CBMWD,” now Inland Empire Utilities Agency,  
24 or “IEUA”) served as Watermaster until April 29, 1997, when the Court relieved it of its duties as  
25 Watermaster. (See *Ruling and Order of Special Reference dated April 29, 1997*.) The Court  
26 relieved CBMWD of its duties in large part due to a dispute between the Advisory Committee  
27 and Watermaster regarding Watermaster’s role vis-à-vis the Advisory Committee. In particular,  
28 the Advisory Committee felt that Watermaster was not performing its duties under the Judgment

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1 and believed that a change in the governance structure was necessary. In addition, Watermaster  
2 had failed to prepare and implement an OBMP, as recommended by Judge Turner in 1989 (*See*  
3 Order dated February 19, 1998, at pp. 8-9.) Thus, certain parties moved the Court to appoint a  
4 nine-member board as Watermaster. The Court declined to appoint a nine-member board, instead  
5 ordering the California Department of Water Resources ("DWR") to serve as interim  
6 Watermaster.

7  
8 When the Court appointed DWR as interim Watermaster, the Court also appointed Anne  
9 Schneider as Special Referee. In so doing, the Court found that:

10  
11 [T]he resolution of the motion to appoint a nine-member board as  
12 Watermaster will necessitate a thorough review of the checks and  
13 balances contained in the 1978 Judgment and an interpretation of  
14 the phrase "discretionary determinations" used in Paragraph 38(b)  
15 of the Judgment.

16  
17 The Court finds that there is an urgent need to address the  
18 issues presented by the motion, and that it is necessary to obtain a  
19 recommendation from a recognized water law expert on the issues  
20 before it. (Ruling and Order of Special Reference, p. 6.)

21  
22 Based on these findings, the Court prepared an Order of Reference, directing the Special Referee  
23 to prepare written recommendations regarding two narrow and discrete issues before the Court:  
24 (1) a *Motion for Order that Audit Commissioned by Watermaster is not a Watermaster Expense*;  
25 and (2) the *Motion to Appoint a Nine-Member Watermaster Board*.

26  
27 On December 15, 1997, the Special Referee prepared a Report and Recommendation  
28 regarding both Motions. (*See Report and Recommendation of Special Referee to Court*

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1 *Regarding: (1) Motion for Order That Audit Commissioned By Watermaster Is Not A*  
2 *Watermaster Expense, And (2) Motion To Appoint A Nine-Member Watermaster Board,*  
3 *hereinafter "1997 Report and Recommendation".) As part of the Special Referee's 1997 Report*  
4 *and Recommendation, the Special Referee noted the urgency of resolving the motion to appoint a*  
5 *nine-member board, given the "poor condition of the basin itself, the inability of Watermaster and*  
6 *the Advisory Committee to resolve essential issues, and the inability of the Watermaster to move*  
7 *forward in light of the interim appointment of the California Department of Water Resources."*  
8 *(1997 Report and Recommendation, p. 2.)*

9  
10 To that end, the Special Referee recommended that the Court set aside the Order  
11 appointing DWR as interim Watermaster and instead appoint a nine-member board as  
12 Watermaster for an interim period of 24 months. The Special Referee further recommended that  
13 the Court order the new Watermaster to prepare an OBMP before the end of the interim period.  
14 The Special Referee noted:

15  
16 The fact that the Watermaster has not prepared the Optimum Basin  
17 Management Program reflects systemic failure of the Judgment and  
18 its Physical Solution, and that failure must weigh heavily in the  
19 decision to appoint a new Watermaster. . . . The proposed  
20 requirements and schedule are intended to provide the Court with a  
21 means to gauge the success of the new Watermaster. If the nine-  
22 member board functions successfully, it will have provided the  
23 Court with an Optimum Basin Management Program before the end  
24 of the two-year period. (1997 Report and Recommendation, p. 32.)

25  
26 The Special Referee further recommended that DWR remain as a potential replacement should  
27 the nine-member board fail to successfully fulfill Watermaster's duties under the Judgment. The  
28 Special Referee also recommended that she exercise continued oversight regarding the

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1 preparation of the OBMP and that the Court also employ a technical expert, as necessary. (1997  
2 Report and Recommendation, p.33.) Again, the Special Referee stated that “[t]he purpose of the  
3 recommended Court oversight and schedule is to provide the Court with a means to gauge the  
4 nine-member board’s efforts to develop the O[BMP].” (1997 Report and Recommendation, p.  
5 34.)

6  
7 On February 19, 1998, the Court set aside its Order Appointing DWR as Interim  
8 Watermaster and instead appointed a nine-member board to serve as Interim Watermaster from  
9 March 1, 1998 to June 30, 2000. The Court also directed the nine-member board to develop and  
10 submit for approval an OBMP. (Ruling dated February 19, 1998, pp. 4, 10.) Given that the nine-  
11 member board was newly appointed, and given that the appointment was on an interim basis, the  
12 Court authorized the Special Referee to make recommendations regarding the development of the  
13 OBMP, “to ensure development of all essential elements of the program.” (*Id.* at p. 10.)

14  
15 Watermaster successfully prepared and submitted an OBMP to the Court, and the OBMP  
16 was approved by the Court on July 13, 2000. On September 28, 2000, the Court continued the  
17 nine-member board appointment until September 28, 2005. (Order Concerning Motion to Extend  
18 Nine-Member Board, September 28, 2000.) At that time, the Special Referee expressed concern  
19 over OBMP implementation and the status of the Peace Agreement; as a result, the Special  
20 Referee developed a schedule, which was ultimately approved by the Court, for OBMP reporting  
21 and for continued oversight of OBMP implementation by the Special Referee.

22  
23 On February 9, 2006, the Court granted Watermaster’s Motion to Re-Appoint The Nine-  
24 Member Board For A Further Five-Year Term until February 10, 2011, overruling the Special  
25 Referee’s recommendation that the Board only be appointed for a two-year term. (February 9,  
26 2006 Order 4:8-10.) CVWD and the City of Ontario both objected to the Special Referee’s  
27 Report regarding the re-appointment. Ultimately CVWD and Ontario entered in to a stipulation  
28 with Watermaster in order to allow the re-appointment process to proceed. The stipulation called

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1 for free attendance by both the Special Referee and her technical assistant at a variety of  
2 Watermaster workshops, and for special workshops to be held specially for the Special Referee.  
3 (February 9, 2006 Order 2:19-28.)  
4

5 During the Peace II process, the Referee engaged in significant oversight in both the  
6 process as a whole, and in some instances, the day-to-day management activities of Watermaster.  
7 In the last three fiscal years, the Referee and her staff have billed a total of nearly \$800,000 to  
8 Watermaster. Since July of last year alone, she and her staff have billed more than \$300,000 to  
9 Watermaster. In her final Report and Recommendations on Motion for Approval of Peace II  
10 Documents, Ms. Schneider stated that the role of the Special Referee is to "(1) provide the court  
11 with as full and complete explanations as possible of what the Watermaster requests or of issues  
12 that have been brought to the court; and (2) to make recommendations to the court as  
13 appropriate." (Final Report at p. 3.) The Referee cites no authority for this statement. However,  
14 it is clear that the Referee views her role as being permanent and ongoing, with broad authority to  
15 opine and make recommendations regarding any issue before the court. CVWD respectfully  
16 submits that this characterization of the Special Referee's role vastly exceeds that which was  
17 authorized by either the 1997 Order of Reference or the February 1998 court ruling, or any  
18 subsequent Orders of the Court.  
19

20 In the time since the Peace II process has concluded, the Special Referee has continued to  
21 engage in significant oversight of Watermaster activities. Shortly after Watermaster filed papers  
22 detailing its Compliance with Conditions 1 through 4 of the Court's December 21, 2007 Order,  
23 the Referee filed Comments to Watermaster's submission. The Comments focused in part on  
24 routine procedural matters regarding the manner by which Watermaster sought Court approval.  
25 In addition, the Comments asked Watermaster to make substantive determinations regarding the  
26 manner in which parties to the Judgment comply with CEQA. Watermaster was forced to file a  
27 Response to these Comments, which CVWD joined. In its Joinder, CVWD noted, among other  
28 things, that the Comments fail to distinguish Watermaster's role as a neutral liaison to the Court

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1 and instead seek to relegate Watermaster to the status of a party to the Judgment.  
2

3 Further, at some point between the appointment of the Referee and the present time, the  
4 Referee employed a special "research attorney" assistant, Judith Schurr. Ms. Schurr does not  
5 appear on the Ellison, Schneider & Harris letterhead, and appears to work for Ms. Schneider  
6 solely with reference to Chino Basin. There does not appear to have been any Court authorization  
7 for this retention, and it is unclear how Ms. Schurr's employment fits within the scope of the  
8 Referee's appointment. The financial obligations assumed by the stakeholders as a result of this  
9 work appear to have been incurred without court approval or oversight.  
10

11 Thus, more than ten years after her appointment to perform a discrete task, the Special  
12 Referee continues to exercise significant oversight over Watermaster activities, and the Court's  
13 consultant staff currently includes the Special Referee, a research attorney assistant for the  
14 Special Referee, and a technical assistant for the Special Referee. However, unlike the situation  
15 ten years ago, Watermaster now functions in an organized and efficient fashion, and the parties  
16 have operated under the present governance structure largely by consensus. Watermaster  
17 employs a Chief Executive Officer, general counsel, technical staff, and office staff; thus,  
18 Watermaster has developed, through its staff and consultants, both the legal and technical  
19 expertise to perform all of the functions intended under the Judgment without need of duplication  
20 by the Special Referee and her staff.  
21

### 22 **III. ARGUMENT**

#### 23 **A. A Special Referee Is No Longer Necessary**

##### 24 **1. Watermaster Now Functions as Intended Under the Judgment and** 25 **Can Be Relied Upon By the Court**

26 The nine-member Board has served as Watermaster for more than ten years. When the  
27 Board was appointed in 1998, the physical conditions and management of the Basin differed  
28 dramatically from how the Basin exists today. In 1998, there was no OBMP, there was

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1 significant confusion as to the roles and responsibilities of Watermaster, water quality in the  
2 Basin was suffering, and the parties generally agreed that the Watermaster process had “ground to  
3 a halt.” (1997 Report and Recommendation, p. 2 [quoting TR 136:25].) The Advisory  
4 Committee sought changes in the governance structure to effectuate the OBMP but was unable to  
5 achieve those changes. In a word, the Basin was dysfunctional, both in terms of its physical  
6 condition and in terms of management. Since that time, the nine-member Board, serving as  
7 Watermaster, has successfully prepared and implemented the OBMP, obtained the unanimous  
8 consent of the parties in approving the Peace Agreement as well as the Peace II measures, and has  
9 successfully managed the day-to-day activities within the Basin. Watermaster employs a staff of  
10 ten people, operates a number of facilities, and functions in the manner that was intended by the  
11 Judgment.

12  
13 In addition, Watermaster has, among other things, successfully constructed the first Phase  
14 of implementation of its Recharge Master Plan, is currently engaged in the second phase of  
15 implementation, and is currently developing an updated Plan; it has overseen the implementation  
16 of the construction of Desalter II and the expansion of Desalter I by the Chino Desalter Authority  
17 (“CDA”) and is facilitating the planning for construction of the next phase of desalter expansion  
18 which will bring desalter capacity up to the OBMP goal of 40,000 acre-feet per year; it has  
19 successfully abated subsidence in MZI and has been able to achieve consensus around a long  
20 term plan for subsidence management; and recycled water use in the Basin is expanding rapidly.  
21 Water quality anomalies are being addressed, and responsible parties are being pursued to make  
22 financial remuneration.

23  
24 Watermaster has proven that it can, and has, successfully carried out its obligations under  
25 the Judgment and can reliably serve as the arm of the Court as intended under the Judgment.  
26 CVWD is aware of no other adjudicated Basin in which a permanent, or even a temporary,  
27 Special Referee is utilized. What is more, the continued use of the Special Referee seems  
28 misplaced in a Basin such as this, which utilizes a highly developed and robust system of checks

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1 and balances as part of Watermaster oversight. Given the success of the nine-member board,  
2 combined with the Court's own familiarity with the Judgment and physical solution, there is  
3 simply no need for the continued use of the Special Referee.

4  
5 **2. Because Watermaster Has Become a Functional Resource for the**  
6 **Court, the Special Referee and Her Staff Are Now Duplicative**

7 One of the most unique features of Watermaster is its consensus-based approach to Basin  
8 management and its reliance on stakeholder input. Notably, in the past six years, the Court has  
9 not been called upon to resolve contested issues between the parties. Further, in the past six  
10 years, no party has found it necessary to utilize the complaint procedure of Article X of  
11 Watermaster's Rules and Regulations, nor has any party complained about the progress of OBMP  
12 implementation. Because Watermaster has implemented a successful stakeholder-dominated  
13 process, which includes participation by Watermaster's technical and legal staff, as well as review  
14 by the stakeholders' own legal and technical experts, the primary tasks for the Court and its  
15 consultants have been to review status reports and approve specific OBMP implementation items.  
16 The Special Referee and her consultants rarely offer substantive changes to these implementation  
17 items or to other projects completed by Watermaster.

18  
19 This has resulted in double the technical review (Wildermuth and Scalmanini) and  
20 double the administrative and legal review (Watermaster and/or its general counsel and the  
21 Special Referee), therefore resulting in double the cost and added delays. The cost and delays  
22 impact local ratepayers and voters; further, the costs and delays are simply unnecessary. Given  
23 the success of the nine-member board and the current management of the Basin, the Special  
24 Referee's costs are merely duplicative. Insofar as they are duplicative, they are also significant. In  
25 2006, the Special Referee and her staff incurred expenses of over \$300,000. For the 2007-2008  
26 fiscal year, these costs are even higher. Frequently over the last ten years, the Special Referee has  
27 exceeded budgeted costs. These costs are ultimately borne, in large part, by the voters and  
28 ratepayers in the Chino Basin.

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1 In its February 19, 1998 ruling, the Court cautioned the Special Referee and her technical  
2 assistant not to duplicate work being performed by the then-existing Chino Basin Water  
3 Resources Management Task Force, which was charged with developing a management plan for  
4 the Basin. Instead, the Special Referee and her technical assistant were to “supplement and  
5 modify” the work, where appropriate. (Order dated February 19, 1998, at p. 10.) The Court  
6 expressed its hope that the procedure would ultimately save money. Given the Special Referee’s  
7 broad-ranging and ongoing activities over the last ten years, this has not been the case.

8  
9 **3. While Duplication of Functions Was Justified in 1998, It is No Longer**  
10 **Necessary or Appropriate**

11 Because of the continued success of the current Watermaster process, the involvement and  
12 oversight of the Special Referee is no longer necessary. As detailed above, the Special Referee  
13 was appointed during a time when the structure of Watermaster was being altered, Watermaster’s  
14 leadership in the Basin was unsuccessful, and Watermaster was not fulfilling its obligations under  
15 the Judgment. However, the facts and circumstances surrounding the Special Referee’s  
16 appointment no longer exist. The Special Referee’s appointment was a *temporary* role designed  
17 to provide a report and recommendations on issues that were before the Court at that time. There  
18 is no indication that either the Court or the parties intended the Special Referee to serve a  
19 permanent and ongoing role in Basin management.

20  
21 With the initiation of Basin Re-Operation, Watermaster and the parties to the Judgment  
22 have proven that they are able not just to react to problems that might exist, but that they can also  
23 work together to develop a program that will truly optimize the Chino Basin for the good of all.  
24 The temporary role for the Special Referee must come to an end at some point in the immediate  
25 future, and the initiation of Basin Re-Operation marks the time for Watermaster to stand on its  
26 own and report directly to the Court regarding its activities.

1 Even if the Court feels that it would benefit from continued technical oversight or  
2 assistance, through the use, on an ad-hoc basis, of a technical expert or some other type of  
3 technical oversight, there is no reason, given Watermaster's success in administering and  
4 enforcing the Judgment, as well as the Court's own familiarity with the Judgment and Physical  
5 Solution, for the continued legal oversight provided by the Special Referee.

6  
7 **B. A Special Referee as a Permanent Fixture is Contrary to the Judgment;**  
8 **Further, Added Delays and Costs Prohibit Watermaster from Functioning**  
9 **Efficiently**

10 **1. It is Watermaster's Role to be the Liaison With the Court**

11 The Special Referee has assumed some of the essential functions of Watermaster, thereby  
12 interfering with the efficient operation of Watermaster. Her actions are thus inconsistent with the  
13 language and spirit of the Judgment. Under the express terms of the Judgment, Watermaster –  
14 not a Special Referee – is appointed by the Court to administer and enforce the terms of the  
15 Judgment. (Judgment ¶ 16.) Watermaster is granted specific powers and duties and is subject to  
16 the continuing supervision and control of the Court. (Judgment ¶ 17.) In its Order dated  
17 December 21, 2007, the Court recognized these functions:

18  
19 “All of Watermaster's enumerated powers originate within and  
20 arise from the Judgment. . . . As all special masters, Watermaster  
21 operates as an extension of the Court and to meet the needs of the  
22 Court in carrying out its obligations under the Judgment and Article  
23 X, Section 2 of the California Constitution.”

24  
25 (Court Order dated December 21, 2007, at . 4 [quoting Watermaster's Responses to Special  
26 Referee Preliminary Comments].) The Court also noted that Watermaster acts as a *neutral* body  
27 and is not an advocate for any of the parties. Thus, in letter and in spirit, the Judgment  
28 contemplates that Watermaster be the liaison with the Court.

1 Notably, a Special Referee is not mentioned in the Judgment and has no powers and duties  
2 under the Judgment. Nonetheless, in practice, the Special Referee has assumed powers and duties  
3 reserved in the Judgment for Watermaster. Although the Special Referee suggests that her role is  
4 essential because she “may be less constrained than Watermaster in raising questions and voicing  
5 concerns,” this is simply not the case. If Watermaster functions effectively, which it does, it is  
6 *Watermaster’s* role, as a neutral arm of the Court charged with administering and enforcing the  
7 Judgment, to raise questions, voice concerns, and ensure that the objectives of the Judgment and  
8 physical solution are satisfied. Indeed, as the Court stated in its February 19, 1998 ruling, it is  
9 Watermaster’s duty to protect the public interest:

10  
11 A review of the Judgment reveals that the Watermaster’s function is  
12 to administer and enforce the provisions therein and subsequent  
13 instructions or orders of the court. . . . The Watermaster operates  
14 on the one hand as an administrator and on the other hand as an  
15 extension of the court. *When functioning as an extension of the*  
16 *court the Watermaster acts as a steward of the groundwater*  
17 *resources in the Chino Basin. The Watermaster must protect the*  
18 *interests of the public as well as the interests of the producers.*

19  
20 (Court Order dated February 19, 1998, at pp. 2-3 [emphasis added].) Given this far-reaching  
21 mandate and explicit duty to act as a steward of the Basin and protector of the public interest, it is  
22 unclear what continued role the Special Referee is meant to serve.

23  
24 At the November 29, 2007 Peace II hearing, the Court was provided with a description of  
25 Basin management issues from the CEO of Watermaster and from Watermaster’s primary  
26 technical consultant, Mr. Wildermuth. As an arm of the Court whose function it is to assist the  
27 Court in the administration of the Judgment, the presentation to the Court by these individuals is  
28

1 exactly the manner in which the Judgment envisions that the Court will receive information. To  
2 CVWD's knowledge, however, this is the *first time* that the Court has received direct input from  
3 these individuals.  
4

5 Under the Judgment, it is Watermaster, not the Special Referee, who should be the liaison  
6 with the Court. However, the Special Referee has now become the sole means by which  
7 Watermaster and the Court communicate regarding the activities of Watermaster. Watermaster  
8 staff has on occasion reported meetings between Watermaster staff and the Special Referee and  
9 her staff. (See e.g., September 28, 2006 Advisory Committee Meeting Minutes, Legal Counsel  
10 Report Item III.A.3; September 28, 2006 Board Meeting Minutes, Legal Counsel Report Item  
11 III.A.3; October 12, 2006 Appropriative Pool Meeting Minutes, Legal Counsel Report Item  
12 III.A.3.) In contrast, Watermaster staff does not report on meetings between Watermaster and the  
13 Court. For example, it does not appear that the Watermaster CEO – the administrative head of the  
14 Watermaster – has even once met with the Court either formally as described above, or  
15 informally as Watermaster meets with the Special Referee and her staff. On the other hand,  
16 CVWD believes that the Referee and her research assistant have regular ex parte contact with the  
17 Court, though the occurrence of these contacts and the content of the communications are never  
18 reported to the parties.<sup>1</sup>  
19

20 **2. The Special Referee Has Inappropriately Expanded Her Reach Into**  
21 **the Day-to-day Affairs of Watermaster**

22 Not only has the Special Referee insulated the Court from Watermaster, she has also  
23 expanded the scope of her own reach outside of the confines of the Court and into the day-to-day  
24 activities of Watermaster. The Special Referee is included on the official Watermaster service list  
25 and so receives all distributions from Watermaster. In a recent Referee Report, the Referee even  
26

27 <sup>1</sup>CVWD believes that any ex parte contact between the Court and the Special Referee is inappropriate. In particular,  
28 CVWD believes that any ex parte contact between the Referee and the Court on the subject of the current motion is  
inappropriate.

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1 went so far as to quote from draft minutes of a report given to the Advisory Committee. (May 2,  
2 2007 *Special Referee's Comments and Recommendations Concerning OBMP Status Report 2006-*  
3 *02, Future Desalting Plans, and MZ-1 Long Term Plan*, 6:13-28.) The Special Referee's  
4 involvement in Watermaster's day-to-day activities are not authorized by, and are inconsistent  
5 with, the terms of the Court review procedures under the Judgment. (Judgment ¶ 31.) The intent  
6 of these procedures is that, even though a level of informality should exist between the  
7 Watermaster and the Court, still the Court retains its character as a judicial process and should  
8 base all of its decisions only on evidence presented to it in accordance with the Code of Civil  
9 Procedure and the Rules of Evidence.

10  
11 As just one example, CVWD notes that in the recent Special Referee's Report concerning  
12 Watermaster's Long Term Plan for the Management of Subsidence, the Referee reports meeting  
13 with the technical experts for the MZ1 parties on October 3, 2007 at the Watermaster offices.  
14 CVWD received notice of a Court-ordered Referee workshop to be held on that date, and then on  
15 October 2, 2007 received notice that the Court had cancelled the workshop subject to potential  
16 rescheduling. It does not appear that the Court authorized the Special Referee to, in substance,  
17 proceed with the workshop on October 3, and it does not appear that any of the parties were  
18 provided any notice that a workshop with the Referee was occurring on October 3. The Referee  
19 thus appeared to be acting outside of the procedures or authorizations of the Court.

20  
21 The Special Referee's initial appointment was to provide a review and opinion with regard  
22 to two specific issues identified by the Court. Now, however, the Referee appears to define her  
23 own scope of work and the breadth of her review appears to be without any kind of limitation or  
24 oversight whatsoever. It is worth noting in this regard that since Watermaster is responsible for  
25 paying all of the Referee's bills, it is not clear whether the Court is in any way aware of the  
26 specific activities of the Referee.

1           Because the Special Referee appears to have become a permanent fixture, the Court's  
2 involvement with Watermaster has deteriorated and the Special Referee's involvement with  
3 Watermaster has expanded so that, in essence, the Special Referee has become the *de facto*  
4 Watermaster, in ~~con~~travention to both the letter and the spirit of the Judgment. All direct  
5 communication between Watermaster and the Court has ceased and has been replaced by indirect  
6 communication only through the Special Referee.

7  
8           **C. The Special Referee As a Long-Term Fixture Creates a Conflict of Interest**

9           The Special Referee was initially engaged by the Court in order to analyze the legal  
10 background and implications of the replacement of CBMWD as Watermaster with the nine-  
11 member Board. When this role was complete, the Referee recommended to the Court an ongoing  
12 role to assess the ongoing success of the Watermaster process. The Special Referee's role has  
13 thus changed from the original reference to one where the Referee passes judgment on the success  
14 of Watermaster. This creates the significant risk that the Special Referee has become motivated  
15 to find fault with Watermaster, since to find that the Watermaster process is a success would  
16 imply that the Special Referee is no longer necessary.

17  
18           CVWD notes that, as quoted above, the 1997 Report and Recommendation suggested the  
19 possibility of standards that could be used to gauge the success of Watermaster. Even though the  
20 exclusive role for the Special Referee now is to gauge the success of Watermaster, the Special  
21 Referee's Reports contain no indication of what Watermaster could do to finally satisfy the Court  
22 that it is successful, and contain no indication of under what conditions the temporary role of the  
23 Special Referee would be complete.

24  
25           On January 30, 2006, CVWD filed an Objection to the *Special Referee's Report and*  
26 *Recommendations Concerning Motion to Re-Appoint the Nine-Member Board for a Further Five*  
27 *-Year Term*. CVWD noted that despite the numerous successes of Watermaster over the past  
28 several years, those successes find very little recognition in the Referee's Reports. After more

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1 than 10 years as Special Referee, and given the expansive role that has been assumed by the  
2 Referee as described above, CVWD believes that the Referee has become too entrenched in her  
3 role and is now motivated to find fault with Watermaster, to the detriment of objectivity.  
4

5 The advantage of organizing the management of the Chino Basin through the judicial  
6 function of the Court is that the ultimate arbiter of various Watermaster issues is an objective  
7 judge who possesses no interest in the issues except that they be decided according to the  
8 Judgment and for the good of the Basin and the public. An essential component of this objectivity  
9 is that the judge is not beholden to the parties in any manner, but particularly in a pecuniary  
10 sense.  
11

12 Expansive Referee Reports that provide detailed analyses of typographical errors,  
13 continuous reporting and workshops whose only purpose is to receive reports, and unnecessary  
14 complication of motions that have unanimous support of the parties may at times have substantive  
15 justification, but it is also important to note that all of these things create a direct financial benefit  
16 for the Referee and her staff. This situation did not exist with the original Order of Reference,  
17 which contemplated a temporary role for the purpose of addressing a discrete set of questions. It  
18 is only because the role of the Referee has gradually expanded into a long-term role that this  
19 conflict of interest has developed.  
20

21 **D. The Special Referee Has a Legal Conflict of Interest**

22 In May 2007, Watermaster, along with the other water entities in the Santa Ana River  
23 Watershed, appeared in front of the State Water Resources Control Board ("SWRCB") regarding  
24 the long running Santa Ana Water Rights application process. (See Declaration of Jill N. Willis  
25 ["Willis Decl."] ¶ 2, Exh. A.)  
26

27 Watermaster was one such applicant and was processing an Application to allow for the  
28 diversion of stormwater for recharge purposes. Watermaster had previously received Court  
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1 permission to file the Application on behalf of the parties to the Judgment. The Special Referee  
2 reviewed the Watermaster's request and on November 8, 2001 submitted a *Special Referee's*  
3 *Report and Recommendation Concerning Authority to Pursue Water Rights Petition.*

4  
5 Another set of participants were the so called, "Santa Ana Mainstem Local Sponsors,"  
6 consisting of the various flood control districts who participated in the construction of flood  
7 control facilities on the Santa Ana River, some of which are used by Watermaster as recharge  
8 facilities. One of the districts is the San Bernardino County Flood Control District ("SBCFCD").  
9 Ms. Schneider personally appeared at the hearing on behalf of the Local Sponsors, including  
10 SBCFCD. (See Willis Decl. ¶ 2, Exh. A.)

11  
12 SBCFCD is the owner of several of the recharge basins that are a part of Watermaster's  
13 Recharge Master Plan. Watermaster interacts frequently with SBCFCD both through the  
14 Groundwater Recharge Coordinating Committee ("GRCC") and through direct interaction with  
15 SBCFCD on various issues relating to the joint use of SBCFCD's facilities. One of the central  
16 issues in the approval of the Basin Re-Operation strategy is how it relates to the development of  
17 recharge capacity in the Chino Basin. The satisfaction of this issue will necessarily imply an  
18 ongoing and potentially increased role for the SBCFCD in the future management of the Basin  
19 under Basin Re-Operation, and will certainly involve continued and expanded investment by  
20 Watermaster in infrastructure at SBCFCD facilities. In addition, a key condition subsequent  
21 identified in the Court's December 21, 2007 ruling is that Watermaster continue to develop and  
22 implement the Recharge Master Plan. The ability to negotiate successfully with SBCFCD is  
23 critical to the success of the Recharge Master Plan. In fact, SBCFCD has been participating in  
24 the development of the outline of the updated Recharge Master Plan.

25  
26 The Court, and by implication a Special Referee who assists the Court, must maintain not  
27 just actual impartiality, but also the appearance of impartiality so that the deliberations and  
28 decisions of the Court will have legitimacy. The California Code of Judicial Conduct provides



1 that a judge or referee should act at all times in a manner that promotes public confidence in the  
2 integrity and impartiality of the judiciary. (Code of Judicial Ethics, Canon 2A) The fact that the  
3 Special Referee has an attorney-client relationship with a key party in the Chino Basin who will  
4 be very important for Watermaster's compliance with any Court Order concerning Basin Re-  
5 Operation, interferes not just with the actual impartiality of the Special Referee, but also with the  
6 appearance of impartiality.

7  
8 Further, under the Code of Judicial Ethics, a lawyer who has been a referee in a matter  
9 "shall not accept any representation relating to the matter without the informed consent of all  
10 parties." (Code of Judicial Ethics, Canon 6D(11).) As described above, the Special Referee has  
11 effectively converted her role from that of providing advice during a transition period to the  
12 Court's general advisor on the overall success of the Watermaster process. In that capacity, the  
13 Special Referee has become involved in almost all facets of Watermaster's operations, including  
14 Basin Re-Operation which, as described above, will require significant interaction with SBFCO  
15 in order to maintain and improve Watermaster's recharge capabilities. Contrary to the  
16 requirement of Canon 6D(11) of the Code of Judicial Ethics, the Special Referee did not receive  
17 the informed consent of Watermaster or any of the parties to the Judgment prior to accepting  
18 representation of SBFCO, nor was such representation, if it existed in 2001, mentioned in the  
19 Special Referee's Report on the subject of the Santa Ana water rights process.

20  
21 Canon 6D(5) of the Code of Judicial Ethics requires that a referee, from the time of  
22 appointment until termination of that appointment,

23  
24 In all proceedings, disclose in writing or on the record information  
25 as required by law, or information that the parties or their lawyers  
26 might reasonably consider relevant to the question of  
27 disqualification under Canon 6D(3).

1 Canon 6D(3)(a)(ii) requires disqualification in a situation in which the temporary judge has  
2 served as a lawyer in the proceeding. Canon 6D(3)(vii)(A) requires the temporary judge to  
3 disqualify herself in any case in which the temporary judge believes that there is substantial doubt  
4 as to her capacity to be impartial.

5  
6 As is evident from Watermaster's Motion and from the Special Referee's report  
7 concerning Watermaster's motion, the development of additional recharge capacity will be an  
8 important component of implementation of Basin Re-Operation. This will necessarily entail an  
9 ongoing and significant interaction between Watermaster and SBCFCD with potential  
10 ramifications for ongoing Court consent and approval of Basin Re-Operation. Having established  
11 an attorney-client relationship with SBCFCD, and having gone so far as to appear in a hearing on  
12 behalf of that client alongside of Watermaster, it is impossible for Ms. Schneider to maintain the  
13 appearance of impartiality in the ongoing work of the Court following approval of Basin Re-  
14 Operation because any recommendations regarding the Recharge Master Plan will likely entail  
15 requiring Watermaster to increase its investment in the facilities owned by her client. This is  
16 especially true since the SWRCB has not yet issued its Order following the hearing so that Ms.  
17 Schneider's representation of SBCFCD is still active and is likely to remain so for some time.  
18 Whatever the outcome of the Court's decision with regard to the role of a Special Referee  
19 generally, Ms. Schneider must be disqualified from that role.

20  
21 CVWD believed that it would be disruptive of the Peace II approval process to dismiss the  
22 Referee prior to the final approval of Watermaster's Motion. CVWD thus refrained from raising  
23 this issue until the end of the Peace II process. However, given the Referee's expansive  
24 continued involvement in Basin management, as evidenced most recently in her comments on  
25 Watermaster's Compliance with Conditions Subsequent One Through Four, CVWD believes that  
26 it is necessary to raise this issue now.

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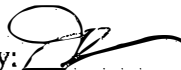
1 **IV. Conclusion**

2 More than ten years ago, the Special Referee was appointed for a limited and temporary  
3 assignment. Somehow that temporary assignment has persisted and even expanded, with no end  
4 in sight, and now the Referee has assumed important functions of Watermaster with regard to the  
5 Court, and has in some sense become the *de facto* Watermaster.

6  
7 The approval of the Peace II documents, and specifically approval of the management  
8 strategy known as Basin Re-Operation, signifies the evolution of Watermaster from its  
9 dysfunctional state in 1997 to its current state as administrator of one of the most innovative and  
10 best managed groundwater basins in the State, if not in the United States. It is time that this  
11 success be recognized. The Watermaster process no longer needs the duplicative oversight of the  
12 Special Referee. It is Watermaster's role under the Judgment to be the liaison with the Court, and  
13 Watermaster should now be permitted to assume that role.

14 Dated: June 30, 2008

BEST BEST & KRIEGER LLP

15  
16  
17 By:   
18 WILL N. WILLIS  
19 Attorney for  
20 Cucamonga Valley Water District  
21  
22  
23  
24  
25  
26  
27  
28

CHINO BASIN WATERMASTER  
Case No. RCV 51010  
Chino Basin Municipal Water District v. The City of Chino

PROOF OF SERVICE

I declare that:

I am employed in the County of San Bernardino, California. I am over the age of 18 years and not a party to the within action. My business address is Chino Basin Watermaster, 9641 San Bernardino Road, Rancho Cucamonga, California 91730; telephone (909) 484-3888.

On June 30, 2008 I served the following:

**1) CUCAMONGA VALLEY WATER DISTRICT'S NOTICE OF MOTION AND MOTION TO DISCONTINUE THE APPOINTMENT OF THE SPECIAL REFEREE**

BY MAIL: in said cause, by placing a true copy thereof enclosed with postage thereon fully prepaid, for delivery by United States Postal Service mail at Rancho Cucamonga, California, addresses as follows:

**See attached service list:** Mailing List 1

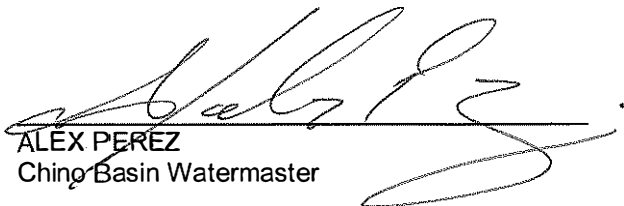
BY PERSONAL SERVICE: I caused such envelope to be delivered by hand to the addressee.

BY FACSIMILE: I transmitted said document by fax transmission from (909) 484-3890 to the fax number(s) indicated. The transmission was reported as complete on the transmission report, which was properly issued by the transmitting fax machine.

BY ELECTRONIC MAIL: I transmitted notice of availability of electronic documents by electronic transmission to the email address indicated. The transmission was reported as complete on the transmission report, which was properly issued by the transmitting electronic mail device.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 30, 2008 in Rancho Cucamonga, California.

  
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