

1 JILL N. WILLIS, Bar No. 200121
BEST BEST & KRIEGER LLP
2 3750 University Avenue
P.O. Box 1028
3 Riverside, California 92502
Telephone: (951) 686-1450
4 Telecopier: (951) 686-3083

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5 Attorney for: Cucamonga Valley Water District
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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN BERNARDINO

11
12 CHINO BASIN MUNICIPAL WATER
DISTRICT,

13 Plaintiff,

14 v.

15 CITY OF CHINO, et al.,

16 Defendants.
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Case No. RCV 51010
Judge: Hon. John Wade

**CUCAMONGA VALLEY WATER
DISTRICT'S SUPPLEMENTAL REPLY IN
SUPPORT OF CVWD'S MOTION TO
DISCONTINUE THE APPOINTMENT OF
THE SPECIAL REFEREE**

Date: November 13, 2008
Time: 8:30 a.m.
Dept.: S32

LAW OFFICES OF
BEST BEST & KRIEGER LLP
3750 UNIVERSITY AVENUE
P.O. BOX 1028
RIVERSIDE, CALIFORNIA 92502

LAW OFFICES OF
BEST BEST & KRIEGER LLP
3750 UNIVERSITY AVENUE
P.O. BOX 1028
RIVERSIDE, CALIFORNIA 92502

1 **I. INTRODUCTION**

2 Pursuant to an agreement with Monte Vista Water District, Cucamonga Valley Water
3 District (“CVWD”) submits the following Supplemental Reply to the Opposition of Monte Vista
4 Water District, the City of Chino, and Chino Hills (“Opposing Parties”) to CVWD’s Motion to
5 Discontinue the Appointment of the Special Referee. Opposing Parties acknowledged this
6 agreement in their “Joint Sur-Reply” filed on October 30, 2008. (See Joint Sur-Reply at 3:16-
7 17).¹

8 As an initial matter, CVWD notes that the procedural posture of this case has changed
9 dramatically since the time CVWD filed its Motion. At the time the Motion was filed, Judge
10 Gunn presided over this matter. As described in CVWD’s Motion, Judge Gunn originally
11 appointed the Special Referee in 1997, citing Code of Civil Procedure section 639(d) as authority
12 for the special reference. Now that the matter has been permanently reassigned for all purposes to
13 this Court, it is unclear whether the special reference continues or whether it has terminated
14 absent an order from this Court re-appointing the Special Referee. Counsel has found no case law
15 in California specifically addressing this point. If the Court determines that the special reference
16 has automatically terminated with the reassignment of this matter, CVWD acknowledges that its
17 Motion is moot.

18 If, however, the Court determines that the special reference survives the reassignment of
19 the case to this Court, CVWD requests that the Court terminate the special reference at this time.
20 In addition to the arguments raised in CVWD’s Motion and in its Reply to the Special Referee’s
21 Response, there are several procedural issues that have now become relevant and that CVWD
22 respectfully requests the Court to consider in ruling on CVWD’s Motion. Because these
23 procedural issues did not become relevant until the case was permanently reassigned, CVWD
24 believes good cause exists to raise them for the first time in this Supplemental Reply.

25 As detailed below, the special reference, both when it was initially made in 1997 and

26 ¹ This Supplemental Reply is not intended to respond to Opposing Parties’ Sur-Reply, which consists primarily of
27 spurious procedural and evidentiary objections that have no bearing on the substance of CVWD’s Motion and do not
28 impact the ability of the Court to grant the relief sought by CVWD. Further, sur-replies are generally not authorized
absent good cause shown or leave of court, neither of which has been shown or obtained by Opposing Parties.

1 when it was expanded in 1998, was not authorized under the Code of Civil Procedure. Thus,
2 there is no legal basis for the continued involvement of the Special Referee in this matter. Indeed,
3 CVWD believes that this Court is well-equipped to preside over this action without the ongoing,
4 permanent assistance of a legal advisor such as the Special Referee.

5 **II. ARGUMENT**

6 **A. The Scope of a Special Reference Is Specifically Limited by Statute**

7 The California Constitution, Article VI, section 22, “prohibits the delegation of judicial
8 power except for the performance of ‘subordinate judicial duties.’” (*Aetna Life Ins. Co. v.*
9 *Superior Court* (1986) 182 Cal.App.3d 431, 435-436.) The Code of Civil Procedure (“CCP”)
10 recognizes two types of reference: a general reference (CCP § 638) and a special reference (CCP
11 § 639). “The statutes carefully preserve the distinction of special and general reference to comply
12 with the constitutional mandate; a general reference has binding effect, but must be consensual,
13 whereas a special reference may be ordered without consent but is merely advisory, not binding
14 on the superior court.” (*Aetna Life Ins. Co. v. Superior Court* (1986) 182 Cal.App.3d 431, 436.)

15 A general reference is conducted pursuant to CCP section 638, which provides for a
16 reference by agreement of the parties: 1. “[t]o hear and determine any or all of the issues in an
17 action or proceeding, whether of fact or of law, and to report a statement of decision;” and 2. “[t]o
18 ascertain a fact necessary to enable the court to determine an action or proceeding.” (CCP § 638.)
19 “In order to comport with the constitutional prohibition against delegation of judicial power, a
20 general reference requires consent of the parties.” (*Ruisi v. Thieriot* (1997) 53 Cal.App.4th 1197,
21 1208; *Aetna Life Ins. Co. v. Superior Court* (1986) 182 Cal.App.3d 431, 436.) The referee hears
22 and determines the *entire* controversy, and the referee’s determination is binding on the parties.

23 A special reference, on the other hand, is conducted pursuant to CCP section 639.
24 Because a special reference does not require consent by the parties, “the authority of the trial
25 court to direct a special reference is limited to particular issues.” (*Ruisi v. Thieriot* (1997) 53
26 Cal.App.4th 1197, 1209.) “The trial court has no power to refer issues other than those explicitly
27 specified by statute.” (*Ruisi v. Thieriot* (1997) 53 Cal.App.4th 1197, 1209; *Williams v. Benton*
28

1 (1864) 24 Cal. 424, 425-426.)² The referee’s determinations do not become binding unless
2 adopted by the trial court. (CCP § 644(b); *Yeboah v. Progeny Ventures, Inc.* (2005) 128
3 Cal.App.4th 443, 450; *Ruisi v. Thieriot* (1997) 53 Cal.App.4th 1197, 1208.) “In fact, in the case
4 of a special reference, the referee’s report is only the first step. The court must [then] determine
5 ‘the facts and the law by rendering its decision containing its findings of fact and conclusions of
6 law which serves as the basis for the judgment *which shall be entered.*’” (*Yeboah v. Progeny
7 Ventures, Inc.* (2005) 128 Cal.App.4th 443, 450.)

8 The appointment of Anne Schneider was by special reference.³ A special reference is
9 authorized under CCP section 639 only in the following circumstances:

10 (a) “[w]hen the trial of an issue of fact requires the examination of a
11 long account on either side; in which case the referees may be
12 directed to hear and decide the whole issue, or report upon any
13 specific question of fact involved therein”;

14 (b) “[w]hen the taking of an account is necessary for the
15 information of the court before judgment, or for carrying a
16 judgment or order into effect”;

17 (c) “[w]hen a question of fact, other than upon the pleadings, arises
18 upon motion or otherwise, in any stage of the action”;

19 (d) [w]hen it is necessary for the information of the court in a
20 special proceeding”;

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25 ² Compare to a general reference where *upon agreement by the parties* the court may order
26 a reference to try “any or all of the issues in an action or proceeding, whether of fact or of law.”
(See CCP § 638; *Ruisi v. Thieriot* (1997) 53 Cal.App.4th 1197, 1208 fn. 13.)

27 ³ See 1997 Order of Special Reference at pp. 10:5-21; see also 1998 Ruling at p. 2:5-16
28 (“[T]he court issued an Order of Special Reference to receive a report and recommendation on”
two specific motions from Anne J. Schneider.)

1 (e) [w]hen the court in any pending action determines that it is
2 necessary for the court to appoint a referee to hear and determine
3 any and all discovery motions and disputes relevant in the action
4 and to report findings and make a recommendation thereon.”
5

6 CCP § 639(a); *Jovine v. FHP, Inc., et al.* (1998) 64 Cal.App.4th 1506, 1522; *Ruisi v.*
7 *Thieriot* (1997) 53 Cal.App.4th 1197, 1209.

8 Absent express statutory authorization to make a reference, such a reference constitutes
9 judicial error that is either void or voidable. (*Ruisi v. Thieriot* (1997) 53 Cal.App.4th 1197, 1208
10 [“An invalid reference constitutes jurisdictional error which cannot be waived.”]; accord *Aetna*
11 *Life Ins. Co. v. Superior Court* (1986) 182 Cal.App.3d 431, 436; but see *Jovine v. FHP, Inc., et*
12 *al.* (1998) 64 Cal.App.4th 1506, 1527 fn. 26 [An act that is beyond the power of the court is
13 voidable.].) Courts have held that an order appointing a “special referee” to hear and determine
14 “law and motion proceedings in an ordinary civil action” is invalid, noting further that [t]he
15 superior court has no power to assign matters to a referee for decision without explicit statutory
16 authorization.” (*Aetna Life Ins. Co. v. Superior Court* (1986) 182 Cal.App.3d 431, 435.)

17 1. **Neither the Initial Appointment in 1997 nor the Expanded**
18 **Appointment in 1998 Fall within the Parameters of Section 639**

19 As noted above, the trial court must have *explicit* statutory authorization to assign matters
20 to a referee. (*Jovine v. FHP, Inc., et al.* (1998) 64 Cal.App.4th 1506, 1523; *Ruisi v. Thieriot*
21 (1997) 53 Cal.App.4th 1197, 1208.) In his 1997 Order, Judge Gunn cited to CCP § 639(d) as
22 authority for the special reference.⁴ The Special Referee was appointed for the limited purpose
23 of providing recommendations for issues relative to two motions.⁵ In his 1998 Ruling, Judge
24 Gunn expanded the Referee’s involvement, this time to “report and make recommendations to the
25 court concerning the contents, implementation, effectiveness, and shortcomings of the optimum

26 ⁴ See 1997 Order of Special Reference at pp. 10:5-11.

27 ⁵ The Special Referee was appointed to consider (1) the Motion for Order that Audit
28 Commissioned by Watermaster is not a Watermaster Expense and (2) the Motion to Appoint a
Nine-Member Watermaster Board. (See 1997 Order at pp. 10:5-21)

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BEST BEST & KRIEGER LLP
3750 UNIVERSITY AVENUE
P.O. BOX 1028
RIVERSIDE, CALIFORNIA 92502

1 basin management plan.” (See 1998 Ruling at p. 9:12-16.) No authority was cited to support the
2 1998 Ruling. Assuming the 1998 Ruling was intended as an expansion of the 1997 Order of
3 Special Reference, both the 1997 Order and the 1998 Ruling were improper because case law
4 indisputably holds that “ordinary civil actions” are not “special proceedings” as defined by
5 section 639(d). (*Ruisi v. Thieriot* (1997) 53 Cal. App. 4th 1197, 1208; *Aetna Life Ins. Co. v.*
6 *Superior Court* (1986) 182 Cal.App.3d 431, 463 [noting that Section 639(d) “does not apply to
7 law and motion proceedings in an ordinary civil action.”].)

8 As a civil action, and not a special proceeding, the only potentially applicable subsection
9 would have been section 639(c), which permits a referee to decide “a question of fact, other than
10 the pleadings, [which] arises upon motion or otherwise.” (CCP § 639(c).) Under section 639(c),
11 however, the Referee would have been limited to deciding questions of fact. Section 639(c) does
12 not authorize the trial court to refer questions of law. (*Ruisi v. Thieriot* (1997) 53 Cal.App.4th
13 1197, 1210; *Bird v. Superior Court* (1980) 112 Cal.App.3d 595, 600.) It appears, however, that
14 the task of overseeing the implementation of the Optimum Basin Management Plan (“OBMP”) -
15 the task assigned to the Referee in the 1998 Ruling - involves questions of fact and law. By way
16 of example, the Referee has had occasion to interpret the California Environmental Quality Act,
17 as evidenced by analyses submitted in key portions of her Final Report and Recommendations.
18 (See, e.g., Special Referee’s Final Report and Recommendations on Motion for Approval of
19 Peace II Documents at pp. 29-30.) Moreover, CCP § 639(c) authorizes a reference for an existing
20 question only, i.e., “one which actually ‘arises upon motion or otherwise’ and is presently before
21 the court.” (*Ruisi v. Thieriot* (1997) 53 Cal.App.4th 1197, 1210 – 1211.) Section 639(c) provides
22 no authority to make a reference for unknown future disputes. (*Id.*) The 1998 Ruling referring
23 Ms. Schneider to oversee the implementation of the OBMP is so overly broad that it resultantly
24 encompasses many issues not before the court at the time of its Ruling. In sum, CCP § 639(c) is
25 “limited [in scope] to factual questions on existing controversies” and is therefore inapplicable
26 here. (*Id.* at 1211.)

27 As detailed in CVWD’s Motion and Reply to the Special Referee’s response, the 1998
28 Ruling has proven to be overly broad. Indeed, the Special Referee has used the 1998 Ruling to

1 assert authority over almost every issue arising in this case. Although labeled a special reference,
2 the extent of the Referee's involvement has transcended the statutory limitations imposed on
3 special references to make recommendations regarding specific issues of fact. The 1998 Ruling,
4 though cloaked as a special reference, in practice functions more closely to a general reference.
5 A general reference is unconstitutional absent express consent by all of the parties for a general
6 reference. (*Aetna Life Ins. Co. v. Superior Court* (1986) 182 Cal.App.3d 431, 435-436.) Express
7 consent for a general reference was not sought here, and even if it was, CVWD's motion is
8 evidence that consent is no longer present.⁶

9 **2. The 1997 Order of Reference and the 1998 Ruling Are Either**
10 **Void or Voidable**

11 Courts are split regarding the effect of an invalid reference. Some courts hold that an
12 invalid reference constitutes jurisdictional error which is void. (*Ruisi v. Thieriot* (1997) 53
13 Cal.App.4th 1197, 1208; *International Jet Ski Boating Assn., Inc. v. Superior Court* (1991) 232
14 Cal.App.3d 112, 116; *Aetna Life Ins. Co. v. Superior Court* (1986) 182 Cal.App.3d 431, 436-
15 437.) Other courts hold that reference to a special referee of any matters other than those
16 explicitly authorized under Section 639 exceeds the court's jurisdiction and is a voidable act.
17 (*Jovine v. FHP, Inc., et al.* (1998) 64 Cal.App.4th 1506, 1527 fn. 26, 1531-1532.)

18 Regardless of whether the 1997 Order and the 1998 Ruling are void or voidable, CVWD
19 recognizes that the parties, including CVWD, have permitted the ongoing involvement of the
20 Special Referee for more than 10 years without objection. Thus, CVWD's intent in raising these
21 procedural issues now is not to ask the Court to determine the initial Order of Special Reference
22 or the 1998 Ruling void or voidable, but rather to highlight the fact that there is no legal authority

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24 ⁶ "[T]he Court has no power to make an unconsented-to general reference, which
25 conclusively decides all or part of a matter, because not only is such a general reference not
26 authorized except by explicit agreement of the parties (CCP § 638), but also, the California
27 Constitution prevents delegation of judicial power except for the performance of 'subordinate
28 judicial duties.' ... Deciding a major legal issue in a case is not a subordinate judicial duty."
(*Aetna Life Ins. Co. v. Superior Court* (1986) 182 Cal.App.3d 431, 435-436.) The statutory
scheme is clear, consent to a general reference must be "in writing and filed with the clerk or, if
oral, the consent must be entered on the record." (*Jovine v. FHP, Inc., et al.* (1998) 64
Cal.App.4th 1506, 1529.)

LAW OFFICES OF
BEST BEST & KRIEGER LLP
3750 UNIVERSITY AVENUE
P.O. BOX 1028
RIVERSIDE, CALIFORNIA 92502

1 to continue the reference going forward.

2 **B. The Concerns Raised by Monte Vista Water District, Chino Hills and**
3 **the City of Chino Are Being Addressed through the Watermaster**
4 **Process**

5 The Joint Opposition filed by the Opposing Parties focuses almost exclusively on issues
6 relating to Watermaster Governance and Watermaster performance. CVWD believes those issues
7 are more appropriately addressed through the Watermaster Process. To that end, discussions
8 regarding Watermaster Governance have been initiated and are ongoing.

9 **III. CONCLUSION**

10 The parties that have filed pleadings in response to CVWD's motion have raised a variety
11 of issues relating to the ongoing role of the Special Referee. The City of Ontario has filed a
12 limited joinder advancing several arguments as to why the Special Referee should not be a
13 permanent fixture but should instead be appointed on a limited, ad hoc basis. The Agricultural
14 Pool has submitted a pleading suggesting that it may be appropriate to prepare a new Order of
15 Reference that more clearly articulates and defines the scope of the Special Referee's duties. In
16 light of these pleadings and CVWD's Motion, CVWD believes that the status quo must be altered
17 and that it is inappropriate, both legally and under the facts of this case, to permit the Special
18 Referee to continue in her current role, which contains very little in the way of restrictions, rules,
19 or boundaries, and is also inconsistent with the Code of Civil Procedure. CVWD agrees with the
20 Agricultural Pool that, should the Court choose to continue the role of Special Referee, further
21 briefing and a new Order of Reference would be appropriate. Insofar as ongoing technical
22 oversight may be appropriate, CVWD is open to discussing how best this can be accomplished.
23 The Agricultural Pool, as well as the Chino Basin Water Conservation District, employ their own
24 technical experts, and CVWD believes that this could serve as a starting point for determining
25 how best to maintain any necessary continued technical oversight.


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27 For the foregoing reasons, CVWD respectfully requests that the Court grant its Motion to
28 Discontinue the Role of the Special Referee.

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Respectfully Submitted,

Dated: November 5, 2008

BEST BEST & KRIEGER LLP

By: 
JILL N. WILLIS
Attorney for
Cucamonga Valley Water District

LAW OFFICES OF
BEST BEST & KRIEGER LLP
3750 UNIVERSITY AVENUE
P.O. BOX 1028
RIVERSIDE, CALIFORNIA 92502

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 November 5, 2008 I served the following:

- 1) **CUCAMONGA VALLEY WATER DISTRICT'S SUPPLEMENTAL REPLY IN SUPPORT OF CVWD'S 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

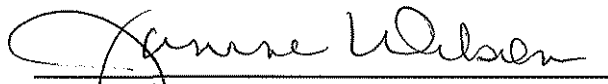
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 5, 2008 in Rancho Cucamonga, California.



Janine Wilson
Chino Basin Watermaster

TERRY CATLIN
2344 IVY CT
UPLAND, CA 91784

KEN WILLIS
LEAGUE OF CA HOMEOWNERS
99 "C" STREET, SUITE 209
UPLAND, CA 91786

ROBERT BOWCOCK
INTEGRATED RESOURCES MGMNT
405 N. INDIAN HILL BLVD
CLAREMONT, CA 91711-4724

JIM W. BOWMAN
CITY OF ONTARIO
303 EAST "B" STREET
ONTARIO, CA 91764

GEOFFREY VANDEN HEUVEL
CBWM BOARD MEMBER
8315 MERRILL AVENUE
CHINO, CA 91710

PAUL HOFER
11248 S TURNER AVE
ONTARIO, CA 91761

BOB KUHN
669 HUNTERS TRAIL
GLEN DORA, CA 91740

CHARLES FIELD
4415 FIFTH STREET
RIVERSIDE, CA 92501

JAMES CURATALO
CVWD
PO BOX 638
RANCHO CUCAMONGA ,CA
91729-0638

GLEN DURRINGTON
5512 FRANCIS ST
CHINO, CA 91710

Members:

Alfred E. Smith	asmith@nossaman.com
Amy Steinfeld	asteinfeld@bhfs.com
Art Kidman	akidman@mkblawyers.com
Barbara Swanson	Barbara_Swanson@yahoo.com
Bill Dendy	bdendy@aol.com
Carol	marie@tragerlaw.com
Carol Davis	cdavis@lagerlof.com
Chris Swanberg	chris.swanberg@corr.ca.gov
Dan McKinney	dmckinney@rhlaw.com
Diane Sanchez	dianes@water.ca.gov
Eric Garner	elgarner@bbklaw.com
Fred Fudacz	ffudacz@nossaman.com
James P. Morris	jpmorris@bbklaw.com
Jean Cihigoyenette	Jean_CGC@hotmail.com
jeeinc@aol.com	jeeinc@aol.com
Jennifer Novak	jennifer.novak@doj.ca.gov
Jess Senecal	JessSenecal@lagerlof.com
Jill Willis	jnwillis@bbklaw.com
Jim Markman	jmarkman@rwglaw.com
Jim@city-attorney.com	Jim@city-attorney.com
jimmy@city-attorney.com	jimmy@city-attorney.com
John Cotti	jcotti@localgovlaw.com
John Schatz	jschatz13@cox.net
Joseph S. Aklufi	AandWLaw@aol.com
Kuperberg, Joel	jkuperberg@rutan.com
Mark Hensley	mhensley@localgovlaw.com
Michelle Staples	mstaples@jdplaw.com
Rodney Baker	rodbaker03@yahoo.com
smt@tragerlaw.com	smt@tragerlaw.com
Steve Kennedy	skennedy@bbmblaw.com
Steven K. Beckett	skbeckett@bbmblaw.com
Steven Lee	slee@rhlaw.com
Steven R. Orr	sorr@rwglaw.com
Tom Bunn	TomBunn@Lagerlof.com
Tom McPeters	THMcP@aol.com
Tram Tran	ttran@mkblawyers.com
William J. Brunick	bbrunick@bbmblaw.com
William P. Curley	wcurley@rwglaw.com

Members:

Al Lopez	lopezsixto@netzero.net
Andy Malone	amalone@wildermuthenvironmental.com
Anthony La	ala@ci.upland.ca.us
April Woodruff	awoodruff@ieua.org
Arnold Rodriguez	jarodriguez@sarwc.com
Ashok K. Dhingra	ashok.dhingra@m-e.aecom.com
Bill Kruger	citycouncil@chinohills.org
Bill Rice	WRice@waterboards.ca.gov
Bill Thompson	bthompson@ci.norco.ca.us
Bob Feenstra	feenstra@agconceptsinc.com
Bob Kuhn	bgkuhn@aol.com
Bonnie Tazza	bonniet@cvwdwater.com
Brenda Fowler	balee@fontanawater.com
Brian Hess	bhess@niagarawater.com
Butch Araiza	butcharaiza@mindspring.com
Carl Hauge	chauge@water.ca.gov
Charles Field	cdfield@att.net
Charles Moorrees	cmoorrees@sawaterco.com
Cindy LaCamera	clacamera@mwdh2o.com
Craig Stewart	cstewart@geomatrix.com
Cruz Diaz	cruzdiaz1965@hotmail.com
Curtis Aaron	caaron@fontana.org
Cyndi Windell	cynthia.windell@sce.com
Dan Arrighi	darrighi@sgvwater.com
Dan Hostetler	dghostetler@csupomona.edu
Dan McKinney	dmckinney@rhlaw.com
Dave Argo	argodg@bv.com
Dave Crosley	DCrosley@cityofchino.org
David B. Anderson	danders@water.ca.gov
David D DeJesus	TVMWDDIV2REP@gmail.com
David D DeJesus	davidcicgm@aol.com
David Ringel	david.j.ringel@us.mwhglobal.com
Dennis Dooley	ddooley@angelica.com
Don Galleano	donald@galleanowinery.com
Duffy Blau	Duffy954@aol.com
Eldon Horst	ehorst@jcsd.us
Eunice Ulloa	eulloa@cbwcd.org
Frank Brommenschenkel	frank.brommen@verizon.net
Fred Lantz	flantz@ci.burbank.ca.us
Gene Koopman	GTKoopman@aol.com
Geoffrey Vanden Heuvel	GeoffreyVH@juno.com
Gerard Thibeault	gthibeault@rb8.swrcb.ca.gov
Gerry Foote	gfoote@cbwcd.org
Grace Cabrera	grace_cabrera@ci.pomona.ca.us
Greg Woodside	gwoodside@ocwd.com
Henry Pepper	henry_pepper@ci.pomona.ca.us
James Curatalo	jamesc@cvwdwater.com
James Jenkins	cnomgr@airports.sbcounty.gov
Janine Wilson	jwilson@cbwm.org
Jarlath Oley	joley@mwdh2o.com
Jeff Pierson	jpierson@unitexcorp.com
Jerry King	jking@psomas.com
Jim Hill	jhill@cityofchino.org
Jim Taylor	jim_taylor@ci.pomona.ca.us
Joe P LeClaire	jleclaire@wildermuthenvironmental.com
John Anderson	janderson@ieua.org
John Ayers	jayers@sunkistgrowers.com
John Bosler	JohnBo@cvwdwater.com
John Huitsing	johnhuitsing@gmail.com
John Thornton	jthornton@psomas.com
John V. Rossi	jrossi@wmwd.com
John Vega	johnv@cvwdwater.com

Jose Galindo
Justin Brokaw
Kathy Kunysz
Kathy Tieg
Ken Jeske
Ken Kules
Kenneth Willis
Kevin Sage
Kyle Snay
Lisa Hamilton
Mark Hensley
Martin Zvirbulis
Mike Thies
Robert Bowcock

jose_a_galindo@praxair.com
jbrokaw@hughes.net
kkunysz@mwdh2o.com
ktieg@ieua.org
kjeske@ci.ontario.ca.us
kkules@mwdh2o.com
kwillis@homeowners.org
Ksage@IRMwater.com
kylesnay@gswater.com
Lisa.Hamilton@corporate.ge.com
mhensley@localgovlaw.com
martinz@cvwdwater.com
mthies@spacecenterinc.com
bbowcock@irmwater.com

Members:

Anne Schneider
Joe Scalmanini
Judy Schurr

ajs@eslawfirm.com
jscal@lsce.com
jschurr@courts.sbcounty.gov

Members:

Manuel Carrillo	Manuel.Carrillo@SEN.CA.GOV
Mark Kinsey	mkinsey@mvwd.org
Mark Ward	mark_ward@ameron-intl.com
Mark Wildermuth	mwildermuth@wildermuthenvironmental.com
Martha Davis	mdavis@ieua.org
Martin Rauch	martin@rauchcc.com
Martin Zvirbulis	martinz@cvwdwater.com
Maynard Lenhert	directorlenhert@mvwd.org
Michael T Fife	MFife@bhfs.com
Mike Del Santo	mdelsanto@prologis.com
Mike Maestas	mmaestas@chinohills.org
Mike McGraw	mjmcmgraw@FontanaWater.com
Mike Thies	mthies@spacecenterinc.com
Mohamed El-Amamy	melamamy@ci.ontario.ca.us.
Nathan deBoom	n8deboom@gmail.com
Pam Wilson	pwilson@bhfs.com
Paul Deutsch	pdeutsch@geomatrix.com
Paul Hofer	farmwatchtoo@aol.com
Paul Lacroix	placroix@reliant.com
Pete Hall	r.pete.hall@cldr.ca.gov
Peter Hettinga	peterhettinga@yahoo.com
Phil Krause	pkrause@parks.sbcounty.gov
Phil Rosenberg	prosenberg@hargis.com
Rachel R Robledo	rrobledo@bhfs.com
Raul Garibay	raul_garibay@ci.pomona.ca.us
Richard Atwater	Atwater@ieua.org
Rick Hansen	rhansen@tvmwd.com
Rick Rees	rrees@geomatrix.com
Rita Kurth	ritak@cvwdwater.com
Robert Bowcock	bbowcock@irmwater.com
Robert Cayce	rcayce@airports.sbcounty.gov
Robert DeLoach	robertd@cvwdwater.com
Robert Rauch	robert.rauchcc@verizon.net
Robert Tock	rtock@jcsd.us
Robert W. Nicholson	rwnicholson@sgvwater.com
Robert Young	rkyoung@fontanawater.com
Roger Florio	roger.florio@ge.com
Ron Craig	RonC@rbf.com
Ryan Shaw	rshaw@ieua.org
Sam Fuller	samf@sbvmwd.com
Sandra S. Rose	directorrose@mvwd.org
Sandy Lopez	slopez@ci.ontario.ca.us
Scott Burton	sburton@ci.ontario.ca.us
Steve Arbelbide	sarbelbide@californiasteel.com
Tej Pahwa	tpahwa@dtsc.ca.gov
Terry Catlin	tlcatlin@verizon.net
Timothy Ryan	tjryan@sgvwater.com
Tom Love	TLove@ieua.org
Tony Banages	tbanegas@sunkistgrowers.com
Tracy Tracy	ttracy@mvwd.org
Vanessa Hampton	vhampton@jcsd.us
WM Admin Staff	