

SUPERIOR & MUNICIPAL COURTS OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

DEPARTMENT H (RC)

HON. J. MICHAEL GUNN, JUDGE

CHINO BASIN MUNICIPAL
WATER DISTRICT,

Plaintiff,

vs.

CITY OF CHINO,

Defendant.

Case No. RCV-51010

REPORTER'S TRANSCRIPT OF ORAL PROCEEDINGS

Monday, March 3, 1997

APPEARANCES:

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CLOUSE

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Reported by:

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Official Reporter, C-10294

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ALSO PRESENT:

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1 RANCHO CUCAMONGA, CALIFORNIA; MONDAY, MARCH 3, 1997;

2 A.M. SESSION

3 DEPARTMENT H (RC)

HON. J. MICHAEL GUNN, JUDGE

4 APPEARANCES:

5 (Appearances as noted on the title page.)

6 (Heather R. Paris, C.S.R., Official Reporter, C-10294)

7 THE COURT: Why don't we do the Watermaster case
8 first; that's case number RCV-51010.

9 When everybody gets here we'll start announcing
10 from one direction or the other. It doesn't matter.
11 We'll see what would be easier. Why don't we start to the
12 right over here with Mr. Gutierrez, I guess.

13 Are there other people sitting down, other parts
14 of the Watermaster?

15 MR. GUTIERREZ: Good morning, Jimmy Gutierrez
16 representing the City of Chino in opposition to the
17 current motion.

18 MR. CIHIGOYENETCHE: Jean Cihigoyenetché on
19 behalf of Chino Basin.

20 MR. KIDMAN: Arthur Kidman here on behalf of
21 Monte Vista Water District. I have my associate David
22 Boyer here as general counsel for Bruce Lance.

23 MS. LEVIN: Marilyn Levin, Deputy Attorney
24 General, representing the State of California in support
25 of the motion today.

26 MR. FUDACZ: Fred A. Fudacz on behalf of Chino

1 Basin Watermaster; and because there's some controversy, I
2 want to be precise. I am here at the direction of
3 Watermaster Services, pursuant to a 91.243 percent vote of
4 the Advisory Committee.

5 MR. DOUGHERTY: Robert E. Dougherty for the City
6 of Ontario.

7 MR. HILL: Boyd Hill on behalf of Markman,
8 Arczynski, Hanson & King on behalf of the City of Upland
9 in support of the motion.

10 MR. TANAKA: Gene Tanaka of Best, Best & Krieger
11 on behalf of Kaiser Resources as well as Cucamonga County
12 Water District, also, in support of the motion.

13 MR. ADAMS: Richard Adams on behalf of the City
14 of Pomona in support of the motion.

15 MR. RYAN: Timothy Ryan, general counsel for
16 Fontana Water Company, in support of the motion.

17 MR. MCPETERS: Good morning. Tom McPeters in
18 support of the motion appearing on behalf of Fontana Union
19 Water Company, Monte Vista Irrigation Company, San Antonio
20 Water Company, and West End Consolidated.

21 THE COURT: And echoing your comments, when it
22 comes to water, people will fight.

23 Okay. This is set again for next Tuesday,
24 right, a week from today?

25 MR. CIHIGOYENETCHE: That's correct.

26 THE COURT: Not the Tuesday after tomorrow.

1 Anyway, I am going to let you argue. I have read almost
2 everything. Monte Vista had a late filing. This is my
3 preliminary thought on this matter:

4 I came down here yesterday. And to give you my
5 tale of woe, I know it looks like I've been in a fight. I
6 have got scratches on my face; my hand is all swollen up.

7 I don't know if any of you have heard of the
8 National Charity League. I was one of the guys who moved
9 the cactus. Something bit me; and my hand was so swollen;
10 and I started to feel like I had the flu when I came down
11 to work on this stuff, so I didn't quite get finished.

12 I was down here a considerable amount of time
13 working on this. It is a close call. And what I want to
14 do is hear your arguments, and I want to reflect. I
15 haven't read Monte Vista's paperwork yet. And I guess
16 Ossiff went beyond the 10 pages, but had a Declaration in
17 there.

18 So which direction do you want to start with?
19 Should we start with Kaiser or Mr. Gutierrez and work our
20 way down?

21 MR. CIHIGOYENETCHE: For purposes of
22 convenience, I would like to argue the issue of
23 disqualification of counsel. First and foremost, I
24 submitted some Declarations this morning. I argued
25 disqualification of counsel in my Opposing Papers; and I
26 submitted additional Declarations to the Court this

1 morning.

2 And Chino Basin Municipal Water District, who as
3 you're aware, also sets as the Board of the Watermaster,
4 they would object strongly and vehemently to Mr. Fudacz'
5 arguing any motions in light of the fact he has a clear
6 conflict of interest as outlined in our moving papers, as
7 well as the fact that last week he was discharged as
8 attorney for the Watermaster. He had no written retainer
9 agreement in force and effect at that time.

10 The Chino Basin Watermaster felt they were not
11 receiving legal representation, which I concur with
12 entirely. And they felt Mr. Fudacz had taken an
13 adversarial position to their position by representing the
14 Advisory Agency, as he is doing here today, according to
15 his statement earlier. The conflict of interest is quite
16 an egregious one, one that compels, I believe, the Court
17 to disqualify Mr. Fudacz from arguing the motion at this
18 point in time or even the motion presently scheduled for
19 the 11th.

20 The authorities are quite clear, I believe,
21 under the Flatt case. It was put in as the Flap case last
22 time. I guess I don't speak clearly into my dictaphone.
23 The Flatt case basically says, when you have simultaneous
24 representation, which is exactly what you have here, the
25 disqualification of counsel is mandatory. It is not
26 subject to the Court's discretion.

1 We would argue that that case is applicable
2 here. It is interesting, in reading Mr. Fudacz's Reply
3 brief last night on the issue of disqualification of
4 counsel, he refers to the Rules of Professional Conduct
5 3-600, but he doesn't refer to the entire rule. And I
6 think the subsequent sections of that provision are
7 directly applicable to that case. I couldn't think of a
8 better example.

9 And I don't know if the Court has had an
10 opportunity to review it or not, but section -- in citing
11 the provision, I think the pertinent provisions are
12 Subsection C, D, and E. In fact, as you will recall, six
13 months ago I know we argued this motion, but I think there
14 is new evidence.

15 THE COURT: You could read my mind. I've got
16 that, is this old wine in a new bottle look on my face.

17 MR. CIHIGOYENETCHE: Every time the -- by the
18 filing of a new motion or the new taking of an adversarial
19 position of Mr. Fudacz -- and the problem is that his duty
20 was to resign when this adversarial proceeding began; and
21 that is supported by 3-600, Subsection C, which basically
22 acknowledges that under certain circumstances an attorney
23 is going to be representing several parties of a
24 corporation, but it also says as follows:

25 "If, despite the member's actions in accordance
26 with paragraph B, the highest authority that can act on

1 behalf of the organization insists upon action or a
2 refusal to act, that is a violation of law and is likely
3 to result in substantial injury to the organization. The
4 member's response is limited to the member's right, and
5 where appropriate, duty to resign in accordance with Rule
6 3-700."

7 Now, Subsection D addresses the specific issue
8 we're dealing with here. It says, you're going along
9 quite fine representing the Advisory Committee in the
10 Watermaster, and sure, your identity would be to render
11 legal opinions and advice as to the day-to-day operation,
12 but when there is a change of power or threatened change
13 of power, now you're placed in an adversarial position.
14 At that point in time -- and Subsection D states that, and
15 it cites that particular situation. And if you go down to
16 the discussion notes, it basically states as follows:

17 "Rule 3-600 is not intended to create or
18 validate artificial distinctions between entities and
19 their officers, employees, or members, nor is it the
20 purpose of the rule to deny the existence or importance of
21 such formal distinctions. In dealing with a close
22 corporation or small association, members commonly perform
23 professional engagements for both the organization and its
24 major constituents. When a change in control occurs or is
25 threatened, members are faced with complex decisions
26 involving personal and institutional relationships and

1 loyalties and have frequently had difficulty in perceiving
2 their correct duty." And then it goes to citations.

3 And then it states, in conclusion, "In reserving
4 such multiple relationships, members must rely on case
5 law." And the language of loyalty is very important,
6 because it throws us right back into the Supreme Court
7 decision of Flatt wherein it says, "In instances of
8 simultaneous representation, loyalty and fiduciary duty is
9 the principal element to be considered, because it is
10 presumed that a party cannot serve two masters," which is
11 exactly what is attempting to be accomplished in this
12 case. And let me give you the example of this case:

13 Here we have an attorney who has, by either
14 intention or omission, allowed the Watermaster Board to
15 ratify conduct -- to ratify actions of the Advisory
16 Committee that have come about by an 80 percent vote or
17 greater. He has never advised the Watermaster Board as to
18 their responsibilities or separation of powers under the
19 Adjudication. He has allowed ultra vires acts, such as
20 the signing of a lease agreement by the director of
21 Watermaster Services, to be ratified by the Watermaster
22 Board, at no time rendering legal advice to that board
23 stating, this is an ultra vires act, you should not ratify
24 it, but at best refer it back to the advisory agency for
25 formal approval and sign the lease agreement upon your
26 own.

1 The director of Watermaster Services has no such
2 authority. But what has happened -- that's just one
3 example wherein such ratification has occurred. What has
4 happened now is that through lack of advice from counsel,
5 the Chino Basin Watermaster has acquiesced and basically
6 become the rubber stamp of the Advisory Committee.

7 Now, for a long overdue occurrence, the
8 Watermaster has sat up and taken notice and stated, hey,
9 wait a minute, who is the fiduciary here? We are
10 approving acts of the Advisory Committee on matters of
11 financial importance -- on investments and disbursement of
12 funds. We're rubber stamping under the 80 percent rule,
13 but are we the fiduciary; or is the Advisory Committee the
14 fiduciary?

15 And at that point in time, the Watermaster
16 begins to object to the budget. They object to some of
17 the conduct of the Advisory Committee; and Mr. Fudacz then
18 takes the position on behalf of the Advisory Committee to
19 remove the Watermaster. Why as he cites in his pleadings,
20 if you go to his Reply Brief, at page 13, lines 19 through
21 22, he refers to the role of counsel for the Watermaster
22 as follows:

23 "Counsel's role is to advise each body as to the
24 requirements it must follow. If there is a disagreement
25 between the different bodies, there is no conflict of
26 interest on the part of counsel in advising each body as

1 to the procedures it must follow." That does not address
2 the issue of taking an adversarial position. Then, if we
3 move on to page 21 of the Reply, we find the problem, page
4 21 at lines 18 through 20, counsel states, "Given the
5 failure of Chino Basin Municipal Water District to fulfill
6 its obligations as Watermaster, the need for a replacement
7 is obvious." In other words, Chino Basin Watermaster has
8 relied on legal counsel to act as the rubber stamp
9 authority for the Advisory Committee. In seeking to oust
10 Chino Basin, legal counsel states that by acting as a
11 rubber stamp they have failed miserably as the
12 Watermaster.

13 Those are the grounds that are now being pursued
14 to oust them. That is a conflict of interest. It was
15 counsel's responsibility to tell them not to be a rubber
16 stamp. He failed to do that. They act as a rubber stamp;
17 and he wants to oust them. Under the rule of Flatt, a
18 distinct conflict of interest has arisen.

19 Mr. Fudacz has taken an adversarial position,
20 which has been reconfirmed by appearing on behalf of the
21 Advisory Committee. He cannot serve both masters.
22 Disqualification is mandatory under the law and is not
23 subject to discretion. And I would plead for the Court
24 that this is truly a serious issue to my client; and they
25 would implore the Court to follow and disqualify
26 Mr. Fudacz.

1 THE COURT: Heather, I want a transcript of
2 this, okay?

3 THE COURT REPORTER: Okay.

4 THE COURT: Okay, Mr. Fudacz.

5 MR. DOUGHERTY: Your Honor, can the rest of us
6 speak to this point?

7 THE COURT: Sure. Let me go over to
8 Mr. Fudacz. We'll try to go back.

9 MR. FUDACZ: I don't think there's any need to
10 defend myself. I am reminded of a quote from Yogi Berra.
11 "This is like deja vu all over again." It strikes me we
12 were here about last year when these same issues were
13 raised before the Court. The same arguments were made.
14 The same Flatt case was cited.

15 All of this was considered by the Court; and the
16 ruling was issued denying the then pending Motion to
17 Disqualify our firm on these same grounds. And there is
18 no motion before the Court at this point. There's simply
19 argument and a Brief.

20 But to recapitulate, our role is to represent
21 the Office of Watermaster. And as we have indicated in
22 our Pleadings and our past Pleadings, this Judgment set up
23 a very unique management structure to deal with the
24 Basin. It set up a Watermaster, a Watermaster Advisory
25 Committee, and various pool committees, all of which had a
26 responsibility to work toward the implementation and the

1 administration of this Judgment.

2 As Watermaster counsel, we, in essence,
3 represent the entity, or organization as if we were
4 general counsel representing a corporation. Who the top
5 dog in all this is has been decided in the 1989 order that
6 Judge Turner issued that was before the Court in 1996.
7 And we resubmitted it to the Court as part of our
8 Pleadings. Judge Turner found that it is the Advisory
9 Committee that is the controlling body -- the
10 policy-making body, the Board of Directors, if you will.

11 And given that situation, if there is a dispute
12 about how the Judgment is to be implemented by these
13 entities, focus on the fact we're not talking about
14 partisan entities. We're talking about entities that are
15 supposed to be the Watermaster's only job. Their job
16 isn't to advocate the interests of the Chino Basin
17 Municipal Water District, their partisan interests; that
18 can be done by Mr. Cihigoyenette. And he does it
19 capably. Their job is to implement the Judgment.

20 The Judgment makes it very clear, when the
21 Advisory Committee acts by an 80 percent vote, that is a
22 mandate to the Watermaster. When we were hired, that was
23 what we were presented with. We were hired in a public
24 meeting of the Advisory Committee. And we were told we
25 were to follow the direction of the Chief of Watermaster
26 Services, who, in turn, is directed by the Advisory

1 Committee, the policy-making, controlling body of this
2 entity.

3 We're in a similar situation as if we were
4 general counsel to a corporation -- or the Board of
5 Directors is saying one thing and the administrative
6 officers are saying something else. We're obviously
7 obliged to follow the directions of the Board of
8 Directors, in this case, the Advisory Committee. As to
9 this tactic that I was supposed to withdraw these motions
10 or face firing; and then I walk into a Watermaster meeting
11 and I am fired, I think the transparency of this tactic is
12 rather clear.

13 We're talking about the district trying to
14 promote it's own interests and maintain it's position as
15 Watermaster in a partisan way. And this action was taken
16 only in contradiction to a mandate from the Advisory
17 Committee. Again, at the beginning of the meeting they
18 were told, by 90 percent, the Advisory Committee had voted
19 that you not take any action with regard to the legal
20 services contract.

21 There is a motion made by a member of the Chino
22 Basin Board to follow the Advisory Committee mandate.
23 That was defeated on a two to three vote. It was only
24 after that that this alleged vote, contrary to the mandate
25 of the Advisory Committee, was taken to remove me from
26 office. Based upon your prior point -- based upon the

1 clear language of the Judge -- based upon Judge Turner's
2 interpretation of what that language means, I don't think
3 I have any duty other than -- and I have a duty to follow
4 the dictates of the controlling body in administration of
5 this Judgment, and that is the Advisory Committee.

6 In this context, we're not talking about
7 partisanship here, even though partisanship has crept
8 in. Chino Basin has the right to try to maintain itself
9 as Watermaster; but it has to do that as the district and
10 not acting as Watermaster. When the Advisory Committee
11 tells it not to do something in a discretionary manner,
12 and it tells it to do something with more than an 80
13 percent vote, it has to abide. Similarly, as Watermaster
14 counsel, I am forced, and I am dutybound, to follow that
15 direction.

16 THE COURT: Okay. Mr. Kidman, I will go to you,
17 unless Mr. Gutierrez wants to be heard.

18 MR. GUTIERREZ: I will let Mr. Kidman go first.

19 MR. KIDMAN: Thank you, your Honor.

20 Arthur G. Kidman for the Monte Vista Water
21 District. We're here to join in opposing this motion
22 concerning the cost of the audit. Since we're first
23 talking about qualification -- or disqualification of
24 counsel, let me address that.

25 With all do respect to Mr. Fudacz, this is the
26 most bizarre thing I have ever seen in water law; and I

1 practice water law all the time. Even in water law, this
2 is bizarre. We have the Watermaster counsel with the card
3 at the top of the Pleadings purporting to act on behalf of
4 the Watermaster, challenging an action of the
5 Watermaster. I have never seen anything like it.

6 And to have the attorneys stand up and say that
7 he doesn't have a conflict of interest is just beyond
8 belief. Every legal ethics course I have ever attended
9 emphasizes that the first thing that has to be done in any
10 analysis of this type is to determine who is the client.
11 Here over the last year, year-and-a-half, we have seen
12 Mr. Fudacz claim, in various respects, that he represents
13 the Watermaster. Certainly the papers are filed on behalf
14 of the Watermaster today. And by action last June, you
15 did appoint the Chino Basin Municipal Water District to
16 continue to act as the Watermaster.

17 He has, at other times, taken the view that
18 the -- his client is the Advisory Committee. He has at
19 other times taken the parent position, as he just did this
20 morning, that he's here representing the Chief of
21 Watermaster Services. And on still other occasions, he's
22 talked about representing the Watermaster sort of as a
23 metaphysical thing, representing all of the producers --
24 or the majority of the producers, or some will that is
25 somehow disembodied from the Court, disembodied from the
26 appointed Watermaster or the Advisory Committee to

1 somehow --

2 This motion today really illustrates how far
3 astray this Judgment -- or the administration of this
4 Judgment has gotten. Mr. Fudacz talks about the
5 controlling body being the Advisory Committee. The
6 Judgment doesn't say that. And I dare say the ruling he
7 refers to from several years ago doesn't say that either.

8 The Advisory Committee, at most, when it acts by
9 a 50 percent or an 80 percent margin on discretionary --
10 underline discretionary -- items has some binding impact.
11 Discretionary is defined in the Judgment, at least by
12 implication to me, as matters that relate to the
13 management of the water resources. It doesn't have to do
14 with administrative items, like the appointment of
15 counsel. It doesn't matter if the Advisory Committee acts
16 unanimously on administrative items as compared to
17 discretionary items. The Watermaster is not bound by
18 those. The Advisory Committee is not the controlling body
19 under the Judgment, when it comes to administrative items
20 on the one hand, as compared to discretionary items.

21 Now, the reason that we're here today, as you
22 have seen from the papers, is that there were reports of
23 financial irregularities within the Watermaster system.

24 THE COURT: I might mention to you, I have read
25 it in the local newspaper, too, but I don't think anybody
26 hasn't around here.

1 MR. KIDMAN: These rumors and reports, as well
2 as official reports by the Chief of Watermaster Services
3 to the Advisory Committee, at least raised an issue, a
4 concern, about whether there was some fire where that
5 smoke was coming from. The Watermaster, as a fiduciary --
6 the Watermaster body, here, being the Board of Directors
7 of Chino Basin Municipal Water District, did the only
8 thing that they reasonably could as a fiduciary, and that
9 was to engage an independent auditor. That is clearly an
10 administrative action. That is not a discretionary action
11 as defined under this Judgment.

12 And the Advisory Committee simply has no -- no
13 standing -- no Brief, no ability to make objections to
14 administrative decisions by the Watermaster.

15 THE COURT: Mr. Kidman, I know when I came out
16 here I said that I would let you argue, and then I would
17 take it under submission and rule next Tuesday when
18 everybody is here, but in light of the fact that Mr. --
19 there is a claimed conflict of interest, do you think it
20 would be appropriate for me to hear argument?

21 MR. KIDMAN: With respect to the underlying
22 audit?

23 THE COURT: Yes.

24 MR. KIDMAN: I am only trying to make the point
25 that this is part of a power struggle that has been going
26 on for some two or three years between the Advisory

1 Committee and the Watermaster; and the underlying motion
2 that we're here on today really illustrates the completion
3 of a coup d'etat of the Advisory Committee. They have
4 done several other steps culminating in this one. They
5 have removed --

6 THE COURT: My question to you is, does anybody
7 mind me taking argument on the motion that was originally
8 scheduled for today? See, there is a Motion to Disqualify
9 Mr. Fudacz. If he is disqualified, then somebody else
10 would have to argue his position.

11 MR. KIDMAN: We would like to have a ruling on
12 the preliminary matter, first.

13 MR. DOUGHERTY: Robert Dougherty representing
14 Ontario. Maybe to the extent that I have been around the
15 last 20 years of the operation of the Judgment, and also
16 had knowledge of how the Judgment came into existence, and
17 why it came into existence may have relevance on
18 Mr. Fudacz's situation and his ability to represent any
19 party who is in this particular Judgment. I don't have
20 any objection to Mr. Kidman making the statements he made
21 if I have my opportunity to disagree with him in the same
22 context. I would like to have the argument fully heard
23 today.

24 MR. CIHIGOYENETCHE: Your Honor, I have
25 submitted my objection in that regard.

26 MR. GUTIERREZ: Your Honor, may I be heard?

1 Jimmy Gutierrez for the City of Chino. I would really
2 like the Court to rule on the disqualification.

3 If I may, first of all, the statement that this
4 is deja vu all over again. It is not deja vu. And I will
5 point out why in a few minutes. But what is interesting
6 is what he says. He says he's here representing the
7 Office of Watermaster.

8 Well, the Judgment only names one Watermaster;
9 and specifically appoints Chino Basin to fulfill that
10 function for the Court. Then he says that he's here at
11 the direction of the Chief of Watermaster Services, that
12 person is Tracey Stewart. She is here today. Tracey
13 Stewart is an employee of Chino Basin Municipal Water
14 District, who is the Watermaster. Why he is taking
15 direction from an employee, I don't know.

16 The last thing he says is he's here for the
17 Advisory Committee. When he started talking, he
18 acknowledged that the Watermaster has several entities;
19 and what is before us today in both of these motions shows
20 a conflict of the first one is a request by the Advisory
21 Committee through Mr. Fudacz that the audit that's been
22 commissioned not be paid out of the funds that all the
23 parties contribute to; and the Chino Basin should pay for
24 them.

25 The second motion is that Chino Basin should no
26 longer be the Watermaster. It is clear there is an

1 adversarial proceeding on both of those issues between the
2 Advisory Committee and Chino Basin Municipal Water
3 District on the other.

4 Let me revisit the deja vu. We were here before
5 you on June 18th of last year when you heard that motion.
6 I did not join in that motion at that time. I said
7 nothing at that time. Frankly, I was confused, because I
8 had assumed that Mr. Fudacz was representing the Advisory
9 Committee, who was then making the motion and calling
10 itself the Chino Basin Watermaster.

11 I believed that because I was -- I was told that
12 there was a contract to that effect. Subsequently, I
13 learned that there was a contract between Mr. Fudacz' firm
14 and the Advisory Committee in 1993 signed by the Advisory
15 Committee; and that agreement acknowledges that the
16 Advisory Committee is an entity under the Judgment.

17 But on January 31st of this year I learned for
18 the first time there was a second agreement. And that
19 agreement was with Mr. Fudacz' firm and Chino Basin
20 Municipal Water District. Now, when we were in court on
21 June 18th, 1996, we all assumed that Mr. Fudacz was
22 representing the Advisory Committee only. Now, I had
23 questions in my mind at that time as to the authority of
24 the Advisory Committee to even hire a lawyer; but that
25 wasn't before the Court.

26 Reflecting back now, I realize that Mr. Fudacz

1 lied. He lied to all of us. And he lied to this Court,
2 because at that time he knew that he had entered into a
3 contract with Chino Basin Municipal Water District, and he
4 failed to disclose that fact. I think if this Court knew
5 at that time that he had two contracts, one with the
6 Advisory Committee, and one with Chino Basin, the Court
7 would have looked at that differently.

8 Today we know that those documents are before
9 you. And as a matter of fact, he had a conflict then; and
10 he has a conflict now; and he continues to insist that he
11 can go forward.

12 The concern of the City of Chino is this: We're
13 footing the bill. And it's not really the city. It is
14 all the water users, because we pass on the assessments to
15 the water users and increase the water costs. Meanwhile,
16 Mr. Fudacz' legal firm keeps churning out bills and
17 churning out bills to actually create this fight and make
18 it bigger. He's the one that's been advising the Advisory
19 Committee they have authority under paragraph 38(b) of the
20 Judgment, because he benefits from it.

21 This is the most blatant example of a lawyer
22 having a conflict of interest; and I believe it is the
23 Court's duty to disqualify him and disqualify him before
24 any other motion is heard.

25 MR. FUDACZ: Can I respond, your Honor?

26 THE COURT: Let's hear from some of the other

1 people, and then I will come back to you.

2 Going down the line it would be Mr. Lance's
3 turn, now.

4 MR. LANCE: I will defer to Mr. Kidman. And I
5 pass.

6 MR. BOYER: I would join with Mr. Kidman.

7 THE COURT: We have heard from Mr. Dougherty,
8 briefly.

9 MR. DOUGHERTY: I did want to have more, your
10 Honor. I was just addressing the issue of whether you
11 should reach the disqualification or should you also hear
12 the motion on a straight calendar.

13 I have been at this from, I think, well before
14 the Judgment. I have been at the meetings about the
15 Judgment, and even negotiated that. I was at the court
16 proceedings when the Judgment was rendered. Basically, we
17 do not have a Judgment in the classical sense; that is,
18 where we have parties come before the Court and present
19 evidence and the Court makes it's rulings on evidence and
20 issues a Judgment which is then binding; and one side is a
21 winner, perhaps, and one side is a loser, perhaps.

22 What we had was a situation where the 400 plus
23 producers in the basin realized that if they did not come
24 up with some way of managing the basin that they would
25 continue perhaps, to be competing; and they didn't want
26 that for a number of reasons, not only the management of

1 the basin, and the proper management of the water
2 resource, but the fact that we did have the opportunity to
3 have storage of a Metropolitan Water District in the
4 aquifer, their water, that would be stored only if we had
5 a managed basin. And seeing the benefits of that, the
6 parties got together and over a period of years negotiated
7 what I would characterize more as a contract among
8 themselves than an actual Judgment in the classical
9 sense.

10 And this contract did set up a mechanism for
11 reserving issues that the parties could not agree on.
12 There came a time when the Watermaster had to be chosen.
13 And there is the issue of why we did pick Chino Basin as
14 the Watermaster. I remember those discussions quite
15 well. The farthest thing from anyone's mind was the fact
16 that Chino Basin was composed of an elected body.

17 The five members of the Chino Basin Board were
18 elected officials, and that somehow was a magic thing that
19 should allow them to act as Watermaster. The fact is at
20 the time the Judgment began, Chino Basin Municipal Water
21 District was not a producer of water from the basin, and
22 not being a producer, they were not eyed by the other
23 producers as having any particular agenda of their own.
24 In addition, Don Stark, who is the attorney who
25 represented Chino Basin at the time, was respected by all
26 of us; and he was really the prime mover at being the

1 master of ceremonies, so to speak, at this series of
2 negotiations which led to the Judgment.

3 Not only did we have in mind how the various
4 water claims or water rights of the respective parties
5 would be handled and protected and utilized; there was a
6 distinct desire on the part of all the producers not to
7 give anything up; that they were not going to surrender
8 their water rights; they were willing, perhaps, to some
9 degree, not insist on everything that they might insist on
10 in a court proceeding where evidence was produced; but
11 primarily they were to preserve -- they wanted to preserve
12 their water rights.

13 So they set up the formulas as they did. And
14 one of the major ways in which they acted is to protect
15 their water rights, which they owned, under California
16 law. I mean, these are not water rights that exist out
17 there in a vacuum; they are property rights, in a sense,
18 or at least they have been treated as property rights --
19 was to set up what we call an Advisory Committee. Now, I
20 think one of the most unfortunate decisions in connection
21 with this Judgment was to name that committee an Advisory
22 Committee, because that's certainly not what they do in
23 terms of a practical matter.

24 Everyone realized you could not exercise
25 day-to-day management of a water basin by a committee.
26 You have too many captains invented as a result of that.

1 And so in that respect an entity had to be picked -- or a
2 person. And I submit that there is no requirement that a
3 Watermaster under the jurisdiction of the Court has to be
4 a publicly elected body or privately appointed body; it
5 could be an engineer who is familiar with water; it could
6 be any number of people or entities who would serve as the
7 Watermaster.

8 And the Judgment was set up very uniquely. And
9 I can't really characterize it or equate it to a
10 corporation in the sense that you have these classic
11 interests that are competing, multi-million dollar
12 salaries, versus somebody else's virtual potential
13 multi-million dollar salary. In fact, I think the Chino
14 Basin Municipal Board gets \$30 a meeting. And as I
15 recall, there is also a limitation on the total
16 compensation of anyone here. It is not that kind of a
17 financial thing.

18 But the Judgment was set up so that you, as the
19 Court -- or whoever happened to have sat in your seat in
20 the past, Don Turner, Mr. Ziebarth --

21 THE COURT: Howard Weiner.

22 MR. DOUGHERTY: Carl {sic} Weiner, very
23 definitely.

24 The ultimate authority and the ultimate
25 jurisdiction would be vested with the Court. And if a
26 dispute did work its way up to you, that dispute would

1 come up in a proper method under the method set up by the
2 Judgment.

3 Now what has happened is, the method that was
4 chosen was for the Advisory Committee to act on matters
5 that are determined to be discretionary in those
6 situations. If the Advisory Committee acts by a 50
7 percent vote, by less than 80 percent -- or maybe 50, but
8 less than 80, then the Watermaster has two choices, the
9 Watermaster, if it intends to go along with the Advisory
10 Committee -- if it agrees with the Advisory Committee --
11 I won't use the word rubber stamp, I think that is
12 inappropriate -- but decides it is appropriate to follow
13 the majority, they will simply do so.

14 On the other hand, if the Watermaster determines
15 that the Advisory Committee recommendation should, for
16 some reason, either be rejected or modified or not
17 followed as given, then the procedure is that the
18 Watermaster must hold a public hearing; it must give 30
19 days' notice -- at least 30 days' notice of the hearing.
20 It must take evidence; and it must make findings that
21 would support it's decision. So what happens if that
22 happens?

23 The Advisory -- the Watermaster makes a decision
24 after that public hearing, and any party to the Judgment
25 who is dissatisfied with it can call that up on a motion
26 to have the Court review it.

1 Now, the 80 percent vote. The Advisory
2 Committee, if they act on a discretionary matter by 80
3 percent or more, it becomes a mandate. That means that
4 Chino Basin is taken out of the loop in the sense that
5 Chino Basin, as Watermaster, cannot overrule the Advisory
6 Committee; but the Judgment expressly provides that if the
7 Advisory Committee gives direction by an 80 percent vote,
8 that the Chino Basin, acting as Watermaster, can itself
9 ask the Court to review the decision.

10 So really, when it comes to the buck stopping,
11 and this checks and balances theory, which really exists
12 only in the minds of the people that wish to perpetuate
13 the Chino Basin as Watermaster, the ultimate determination
14 is made by the Court in all occasions. I think it is
15 rather, shall we say, ludicrous, to try to label as
16 administrative the actions that were taken by the
17 Watermaster in connection with not only Mr. Fudacz, but in
18 connection with the audit and everything else.

19 In a sense you have -- I think, if I remember my
20 rock, my mineral, vegetable, animal, in the context of
21 what we do in life as people -- a board can take one of
22 three actions. It can either take a judicial action. I
23 don't think anyone is going to argue Chino Basin as
24 Watermaster acts in a judicial capacity. You're the
25 Judge. You act in the judicial capacity. They don't act
26 in a legislative capacity. They cannot act and change the

1 Judgment. They can't vote, as that body of five can, or
2 do anything at all that could effect this Judgment or how
3 this Judgment is handled.

4 So everything they do is administrative.
5 Administration breaks down into two things. You have a
6 mandatory duty. Well, a mandatory duty is something that
7 a statute tells you you must do. So if the statute says
8 you must do something, and you are given no choice at all
9 about doing it, then if you have a choice to do A or B,
10 and perform the mandatory duty, your choosing A or B
11 becomes discretionary.

12 On the other hand, if the statute says, you will
13 lock the door every night before you go home, that act of
14 locking the door having been mandated, it is now
15 administerial. You don't have a choice as the person who
16 is commanding. You have to lock that door or whatever act
17 is administerial.

18 I think the attempt to distort the
19 classifications by counsel in opposition to the motion
20 here is not appropriate. I also heard everything blamed
21 on Mr. Fudacz' firm for all the reasons why the Chino
22 Basin Board has not appropriately reviewed everything that
23 the Advisory Committee has done over these years. And it
24 is all his fault. I assume to gather from this that the
25 Chino Basin Board didn't wake up and start opposing
26 Advisory Committee actions before all of that -- I believe

1 Mr. Fudacz has only been around for about three years of
2 the approximate 20 years that this Judgment has been in
3 effect. And we had Mr. Don Stark before him. We had
4 Mr. Smith after Mr. Stark, and before Mr. Fudacz. And I
5 don't think that is the problem.

6 So getting back to -- and I think I digressed
7 quite a bit to Mr. Fudacz and whether or not he should be
8 disqualified. Again, I think this is a unique situation
9 that you can really put into a pigeon hole. Mr. Fudacz,
10 quite frankly, your Honor, is what I consider an officer
11 of this Court. The Judgment, although by stipulation, is
12 a product of this Court. And Mr. Fudacz, ultimately owes
13 his responsibility to this Court. And I, quite frankly,
14 think he has discharged it in an exemplary manner.

15 MR. HILL: Boyd hill on behalf of the City of
16 Upland. I will be brief inasmuch as I don't have as many
17 gray hairs as the gentlemen to the left of me. With my
18 five years in water law, I am beginning to gain those.

19 Your Honor, a few simple points. The Advisory
20 Committee, with an overwhelming majority, approved the
21 bringing of this motion. This is not a motion that is
22 going to go away just because of a procedural tactical
23 battle over who represents the Advisory Committee. This
24 is a motion that is timely; that is in front of the Court
25 that cries out for being heard. Clearly, the Advisory
26 Committee has the authority to bring this motion under

1 Section 38(b) where it states, "The Advisory Committee
2 shall have the duty to study, and the power to recommend,
3 review, and act upon all discretionary determinations made
4 or to be made hereunder by Watermaster."

5 There is no distinction, as has been pointed out
6 previously, between discretionary actions to
7 administration, or whatever in this language. It is very
8 broad, your Honor. So we do have a motion properly
9 brought that has been adequately briefed that is in front
10 of the Court. What has not been adequately briefed is the
11 Motion to Withdraw as Counsel. This is a motion not
12 timely brought up, not clearly briefed or before this
13 Court; and I will discuss the merits of that motion
14 briefly at the end of my comments.

15 But the action that was taken by the Chino Basin
16 Watermaster was clearly thought authorized under the
17 Judgment once an Advisory Committee had made it's 80
18 percent plus recommendation. In the interest of judicial
19 economy, and to avoid having to come back to Court and
20 rebrief this motion, we believe that the motion before the
21 Court should be heard, not the Motion to Disqualify, that
22 raises several other issues which have not been adequately
23 briefed; and this motion will be brought at this point by
24 whoever the Advisory Committee --

25 THE COURT: Let me interrupt you one moment.
26 How many people were aware there was going to be a Motion

1 to Disqualify today?

2 Mr. Kidman?

3 MR. HILL: I was not until I got here.

4 MR. GUTIERREZ: It was in his Opposition.

5 MR. DOUGHERTY: Your Honor, I might say that we
6 knew Chino Basin had taken the position, the Chino Basin
7 Board, that Mr. Fudacz resign, that was the position they
8 had taken. As far as knowing they were going to assert a
9 disqualification and raise it by way of an oral motion,
10 no, I didn't know.

11 MR. CIHIGOYENETCHE: It is in my Pleadings.

12 THE COURT: It is in your Opposition.

13 MR. CIHIGOYENETCHE: It is in my Opposition.

14 MR. DOUGHERTY: The problem is if that's what
15 you intended, you didn't give the 30-day notice as
16 required.

17 THE COURT: Okay. All right.

18 MR. HILL: May I proceed?

19 THE COURT: Sure.

20 MR. HILL: The real issue here, which is the
21 issue that the Advisory Committee is wrestling with, is
22 the payment of fees on behalf of Chino Basin Municipal
23 Water District trying to bring audits to -- to bring about
24 it's political purposes; and the cities are being asked to
25 pay these fees as if they were authorized Watermaster
26 expenses. And we believe that the 80 percent plus

1 recommendation of the Advisory Committee against this,
2 prior to the audit, speaks clearly to that issue. And
3 that there is no -- there is no basis for Opposition to
4 the motion before the Court. That is the true concern of
5 the public entities that are in support of the action of
6 the Advisory Committee.

7 Further, your Honor, with respect to the -- to
8 the motion -- purported motion on attorneys -- or on
9 disqualification of counsel, I would cite your attention
10 to paragraph 38(c) of the Judgment, which does not give as
11 clear a situation as would have been represented by the
12 moving parties as to the disqualification motion. It
13 states, "Watermaster, the Advisory Committee, or any Pool
14 Committee shall be entitled to employ counsel and expert
15 assistance in the event Watermaster or such Pool or
16 Advisory Committee seeks Court review of any Watermaster
17 action or failure to act. The cost of such counsel and
18 expert assistance shall be a Watermaster expense." This
19 is not a clear case, as counsel would represent might be
20 under the facts of the Flatt case.

21 This is not the Flatt case, nor is the provision
22 that you will find in many -- I would believe any other
23 judgments in the state of California in water-related
24 judgments. I know, personally, in the Mojave case we did
25 not give our Advisory Committee such authority to appoint
26 counsel. This is a rather novel provision and deserving

1 of further briefing, and also as to the issue of
2 disqualification of counsel.

3 Thank you, your Honor.

4 MR. TANAKA: Your Honor, at the heart of the
5 motion -- or effort to disqualify; at the heart of the
6 motion on the audit; and the heart -- at the heart of the
7 motion coming up next week, is the issue of who's in
8 control. Is it the Advisory Committee? Is it
9 Watermaster? Are there checks and balances. There has
10 been a lot of rhetoric, some of which I feel is
11 inappropriate. I would express, the language of the
12 Judgment -- I think the issue is really clear as to this
13 point. If you'll permit me, your Honor, may I approach
14 counsel and the Court, I have copies of very short
15 sections of the Judgment?

16 Your Honor, the inquiry begins in Section 38(b),
17 the introductory language is clear beyond question. It
18 says, "The Advisory Committee shall have the duty to
19 study, and power to recommend, review, and act upon all
20 discretionary determinations made or to be made hereunder
21 by Watermaster." It does not say some, or specify which
22 part. It says, "all discretionary decisions."

23 In (b)(1) and (b)(2) it defines with further
24 specificity how that power of the Advisory Committee is to
25 be exercised. Under (b)(1), as the title says, "It is
26 committee initiative, this deals with when the water --"

1 Excuse me, "--- when the Advisory Committee has acted." And
2 there are two scenarios. If the committee acts with less
3 than 80 percent of the authority, the Watermaster, acting
4 contrary to that, must therefore hold a hearing and have
5 written decisions with findings.

6 On the other hand, as in this case where the
7 Advisory Committee acts with 80 percent authority, it is
8 called a mandatory action; and then the Watermaster must
9 go to Court under Section 38(c).

10 Finally, your Honor, under (b)2, where the
11 committee has not acted, then you're in a committee review
12 situation. And the Watermaster must give the committee 30
13 days' notice before it takes any action. This is not
14 checks and balances. This is not two separate entities.
15 This is a separate entity that quite clearly contemplates
16 that the Advisory Committee is in charge.

17 Let me address another issue which seems to keep
18 popping up, which is the straw man argument. The argument
19 is made by the other side that discretionary decisions are
20 designed under Section 41 of the Judgment, that's page 23;
21 and it is in that handout that I just provided everybody.
22 If you will note, your Honor, that argument has two
23 problems.

24 The first is it is an entirely different
25 section, section 6 dealing with the physical solution.
26 And it talks about the Watermaster's authority with the

1 advice of the Advisory Committee as to creating a physical
2 solution for the basin. There is nothing within that that
3 says there is the exclusive definition of discretion.
4 There is nothing that indicates that this section is
5 intended to apply to all the other separate and different
6 sections. That is the first problem.

7 But the second problem is, even if you take
8 their arguments at face value and assume that they are
9 correct, the discretionary decision is designed at
10 creating a management program. If that is all the
11 discretion they have, then they have no ability to oppose
12 what's going on here. So for two reasons, that argument
13 just doesn't fly.

14 Finally, your Honor, I want to address very
15 briefly the Watermaster's authority. A lot of argument is
16 made as to the different authority they have. If you'll
17 look at Section 20 on page 13; it talks about their
18 authority to employ experts, but it says, that authority
19 is quote, "Appropriate in the carrying out of its
20 producers." So again, that's designed by whatever power
21 the Watermaster is designed to have. Again, on the next
22 page, Section 25, it provides, "The Watermaster may enter
23 into contracts for the performance of any powers herein
24 granted." As I have just indicated, your Honor,
25 Section 38(b) answers the question as to what the powers
26 are and who exercises them.

1 Finally, your Honor, there is an argument made
2 that the only way any Watermaster action can be reviewed
3 is by coming to court. And that's not entirely true. If
4 your Honor will look, please, finally to Section 31(b) on
5 page 16, it talks about the Watermaster's authority. As
6 to any mandated action, the Watermaster can go to court.
7 The point I am trying to make on the mandated action is a
8 designed term under Section 38(b). And 38(b) contemplates
9 a prior administrative proceeding.

10 In other words, yes, the Watermaster can go to
11 court and challenge a mandated action. That is all in the
12 context. And it clearly contemplates the administrative
13 proceedings that have gone on here and have been properly
14 followed.

15 THE COURT: Anybody else wish to be heard?

16 MS. LEVIN: Yes. Marilyn Levin, State of
17 California, just very briefly. What Mr. Tanaka said, I
18 had my Judgment open to the exact same pages. I would
19 urge the Court in two areas.

20 One, you asked whether or not we should go ahead
21 and make arguments on the audit issue because we're here.
22 And I believe that we have not addressed substantively
23 those arguments. And I would support this morning having
24 those arguments heard; most of us have either briefed that
25 issue or joined in the motion. And, your Honor, we need
26 an answer.

1 Secondly, at some point we would like to proceed
2 with the substantive audit issues.

3 THE COURT: Let me ask you -- let me interrupt
4 you just a second. And I want to get this put to bed as
5 soon as possible, too, but just because Mr. Cihigoyenetché
6 had it in his Opposition, it really wasn't a motion that
7 is before the Court today.

8 MS. LEVIN: That was my second -- that was going
9 to be my second point.

10 THE COURT: It is something that, I guess, comes
11 with the territory; and it may effect in hindsight
12 whatever we do today. That's the only problem I have.

13 Go ahead.

14 MS. LEVIN: My second point was that -- what
15 Mr. Fudacz first said. One, that this motion -- the
16 actual motion was made before your Honor ruled on it. And
17 nothing has changed since then. I don't believe that
18 raising such an important issue in an Opposition is
19 adequate notice for all the parties if they want to
20 respond to that in the context of the language of the
21 Judgment.

22 I think Mr. Tanaka has correctly pointed out
23 that most of this is an interesting Judgment; and to make
24 any kind of decision, even with respect to
25 disqualification, one has to look at the Judgment.

26 I made a comment at a public meeting a couple of

1 days ago; and I would just like to restate it. That is,
2 in my opinion, Mr. Fudacz does represent, in a global
3 sense, the Office of the Watermaster. I think he has been
4 straightforward in that position. The Judgment did
5 anticipate that in certain instances where there is a
6 mandated action, it is not a rubber stamp, as Mr. Tanaka
7 indicated and cited you to the section; it is simply the
8 Watermaster following a mandated action or choosing not to
9 follow a mandated action. And I agree, conceptually, it
10 sounds a little strange. And so in those situations,
11 Watermaster -- and the section is 38(c). In those
12 situations where Watermaster -- and that is the Board
13 sitting as Watermaster -- as to a mandated action shall be
14 entitled to employ counsel and expert assistance in the
15 event Watermaster, such Pool, or Advisory Committee seeks
16 Court review of any Watermaster action.

17 In other words, your Honor, there were
18 anticipated certain situations where the Watermaster, as
19 to it's own action -- mandated action, did not agree with
20 it's own action. And in those limited situations the
21 Watermaster could hire counsel. And I don't know if you
22 agree at this point, but that is exactly what you said at
23 the last hearing. You said Chino Basin Municipal Water
24 District, whatever entity it was, whether it was or was
25 not Watermaster, was adequately represented here in
26 court.

1 And I think the disqualification argument -- and
2 I am not going to give it the respect of a motion; that is
3 really missing the point. Within the context of the
4 Judgment, we are here on a limited issue. We are here on
5 the audit issue. As to that issue, the Watermaster that
6 you appointed as an interim Watermaster has hired an
7 attorney. He is here adequately representing the Chino
8 Basin Municipal Water District in whatever entity they are
9 at this point.

10 Mr. Fudacz has been previously hired as the
11 attorney representing the Office of the Watermaster; and
12 in my opinion, that involves all of the Pools and the
13 Advisory Committee in its mandated action. And there are
14 sub-issues that you can get to -- and I think the Judgment
15 is very clear that the Advisory Committee is not
16 prohibited, even if your Honor determined that somehow an
17 audit -- a Request for an Audit were some type of
18 administrative action, which is not defined in the
19 Judgment; it doesn't preclude the Advisory Committee from
20 acting in certain activities -- certain discretionary
21 activities that also may be considered administrative.

22 I guess what I am saying, your Honor, you can
23 get to those issues, but it seems to me we're here on a
24 very limited issue. That is the Motion for the Audit; and
25 that Mr. Fudacz is adequately representing the Office of
26 the Watermaster. He has written letters to the Board

1 indicating what procedures they were required to follow,
2 in his legal opinion.

3 Under the Judgment in this particular situation
4 with respect to the audit, the Watermaster Board chose not
5 to follow the procedures in the Judgment or interpreted
6 them differently, and they hired an attorney; and they're
7 adequately represented here. So it seems to me you can
8 hear all of the arguments today; and that there are enough
9 of the -- of us here that can address the second issue and
10 support Mr. Fudacz in his arguments.

11 THE COURT: So if anything, we're over
12 represented is you're argument, right? There may be
13 people here who would agree with that.

14 Certainly, everybody is a very competent
15 advocate.

16 MR. FUDACZ: Your Honor, I would like to correct
17 one thing. Mr. Gutierrez made a charge that somehow we
18 misrepresented our situation to the Court when we were
19 here back in June of 1996; and if the Court looks at those
20 filings that we filed at that time, and I have them in
21 front of me, the Response to the motions of Chino Basin
22 Municipal Water District for disqualification of
23 Watermaster Counsel, which we filed June 11th, we
24 specifically indicated that we had an agreement to be
25 Watermaster General Counsel.

26 We specifically indicated that we had been

1 previously hired as counsel for the Advisory Committee;
2 and, in fact, we attached as Exhibit D to that filing the
3 minutes of the Watermaster's quarterly meeting where they
4 approved, quote, "an agreement with the firm of Nossaman,
5 Guthner, Knox & Elliot to provide general counsel services
6 for the fiscal year 1994 through 1995." We couldn't have
7 been more clear about it, your Honor.

8 THE COURT: Okay. I am going to go past the
9 disqualification -- I am not ruling on the merits of it,
10 though. In other words, there may or may not be
11 something. If this is old wine in a new bottle, then, of
12 course, my ruling would be the same, of course, as it was
13 before.

14 I wasn't prepared, really, to address it as a
15 motion today. And, in fact, when I came in yesterday --
16 for whatever reason -- maybe it was that cactus; maybe it
17 was my turn to go south mentally, or yeah, mentally and
18 physically, I guess.

19 What I would rather do is go to the merits of
20 the motion; and I will rule on it. I will give you a
21 ruling next Tuesday, though. My general thoughts are --
22 and I will let everybody address them. When you get to
23 paragraph 38, you're talking about the physical solution.
24 When you're down toward paragraph 20, you're talking about
25 administrative functions.

26 And there are several things that concern me.

1 And I am not really prepared to rule today, so I could be
2 persuaded one way or another. Presumably at this point I
3 was concerned, if there is a problem, why did you just go
4 ahead and hire the experts incurring a \$30,000 expense
5 rather than come to court ahead of time.

6 I guess the counterbearing argument, I thought
7 that may effect that would be, then we're going to the
8 Court seeking advisory opinions.

9 Mr. Tanaka points out, though, that the Judgment
10 says on page --

11 MR. TANAKA: 22, your Honor.

12 THE COURT: (c), you can come to court. So
13 apparently, the Judgment says you can come to Court
14 seeking advice. So I will leave it at that. Those are
15 the three main areas that kept on conflicting with each
16 other in my mind as I was going over it, but I promise you
17 a ruling next Tuesday. I will let anybody argue on those
18 issues. I have heard Mr. Tanaka's argument.

19 MR. CIHIGOYENETCHE: With all do respect, before
20 we get into argument, I would like to make a record that I
21 believe to allow argument on this issue would create
22 irreparable harm to my client in light of the fact we
23 can't unring the bell. And I would like to have a ruling
24 on the issue of disqualification before we proceed
25 further. And if indeed, number one, I believe that the
26 issue is one of standing; that is, can Mr. Fudacz even

1 have standing to bring the motion he has brought.

2 And if it is the Court's inclination not to
3 disqualify Mr. Fudacz, I would respectfully request the
4 Court for a stay of this proceeding to at least
5 consolidate it to the 11th that we may Petition the Court
6 of Appeal on a Writ of Mandate. And I don't want to court
7 any irreparable harm to get to my client if we get into
8 the thick of the argument as to the underlying motion.
9 That's my concern.

10 MR. DOUGHERTY: Your Honor, to the extent that
11 Mr. Fudacz may not have standing -- and we don't agree
12 with that at all -- the motion has been joined in by the
13 City of Ontario; and I think practically every attorney
14 here, with the exception of the attorneys representing
15 Monte Vista Water and Chino -- I mean, Chino Basin
16 Municipal Water District.

17 I would submit that the Motion to Tax the Audit
18 Expense to Chino Basin as their motion, as well as the
19 Advisory Committee's motion; and it would really be rather
20 pointless, in view of the work that has been done already,
21 for me to be told, Mr. Dougherty, go back and plagiarize
22 Mr. Fudacz' Moving Papers and Points and Authorities and
23 resubmit them. I agree with what he said. I don't think
24 I could have said it any better.

25 I am an attorney. I won't say I couldn't have
26 said it any better -- or at least I won't say it here. In

1 any event, we believe the motion should proceed on the
2 merits. It is simply a stalling tactic in trying to keep
3 it from being heard today.

4 THE COURT: I am not so sure it is properly
5 before the Court at this time, either.

6 MR. KIDMAN: Your Honor, may I inquire? I don't
7 mean to be obsequious, but are you okay? Sometimes you
8 have an allergic reaction to cactus; and you seem to --

9 THE COURT: Well, I did, but I am feeling like I
10 am mentally okay to hear your arguments. Yesterday I was
11 physically ill. Yesterday I came down here and it started
12 getting worse and worse. My hand is still red and
13 swollen, but it was bigger; and it was -- I was really
14 concerned whether I should actually go to the doctor.

15 I don't know if something bit me, but I feel
16 fine today. I can move my hand. And mentally I feel that
17 I can consider your arguments today. It's just that I was
18 prevented from preparing as thoroughly as I would have
19 liked to prepare for today. That's the reason I want to
20 hold off on this.

21 I attempted to articulate to you the areas of
22 concern, the earlier parts of the Judgment versus the
23 later parts; the physical solution versus the
24 administrative solution of the Watermaster.

25 MR. DOUGHERTY: Your Honor, if it would serve --
26 if it would give you the opportunity to read everything,

1 I, certainly speaking for Ontario, wouldn't have any
2 objection coming back on another day. The whole issue is
3 so important; if there is any concern about proceeding
4 today, then we should certainly put it over. For example,
5 the issue of whether or not paragraph 38, you know, comes
6 under the physical exclusion, we disagree. The physical
7 solution begins with paragraph 39.

8 MR. HILL: Yes.

9 THE COURT: Follows it. You're right.

10 MR. DOUGHERTY: So 38 would apply to everything
11 at least that has gone before; and 39 is where you get
12 into that physical solution.

13 THE COURT: If you guys want, I will put
14 everything over until next Tuesday.

15 MR. CIHIGOYENETCHE: That would be fine.

16 THE COURT: That would give you time to do some
17 more briefs. Everybody is going to be back next Tuesday
18 anyway. And it would be better for me. I was away at the
19 end of last week at a court mandated -- court school. And
20 Sunday was my only shot at getting up to speed on this.
21 And I blew it with the cactus.

22 That's fine. We'll just do it next Tuesday.

23 The Points and Authorities, including
24 Mr. Kidman's, will be considered, though, that have been
25 filed. You were a little bit late, but --

26 MR. KIDMAN: I think we intended to file a

1 Joinder; and I believe that's all you have.

2 MS. LEVIN: Your Honor, may I query? Are you
3 intending to allow Chino Basin Municipal Water District to
4 file some sort of motion now? It seems to me if you
5 are --

6 THE COURT: He's not going to file a motion with
7 me. His remedy is with the Court of Appeal. It is
8 between him and the Court of Appeal. And I certainly
9 can't tell him, you can't file a Writ of Prohibition. If
10 he feels that's necessary, I am not going to tell him,
11 hey, you can't go to the Court of Appeal and appeal
12 something that I am doing. I don't think that's
13 appropriate for me to do.

14 MR. CIHIGOYENETCHE: Your Honor, I don't know if
15 I have a ruling to appeal from at this point in time. And
16 I am concerned that we're going to ring the bell; and we
17 can't unring the bell.

18 THE COURT: I intend to go ahead with the
19 motion. I will let you know that. I intend to get on
20 with the motion -- your Motion to Disqualify. I don't
21 think it is properly before me today. I think the motion,
22 with respect to the hiring of the experts, is properly
23 before me today. So that's the problem we have with
24 respect to your -- it is in your Opposition.

25 MR. KIDMAN: Your Honor, I don't want to put
26 words in your mouth on this important issue; but am I

1 understanding you then to say you're not going to rule on
2 the disqualification at all?

3 THE COURT: Well, to the extent that I am saying
4 that Mr. Fudacz is not disqualified at this point, I don't
5 think it's properly before me, then I guess it is a
6 ruling, if that's what you want me to say. I intend to go
7 ahead with the motion, which I think is before me on
8 Tuesday, a week from tomorrow.

9 So as far as Mr. Fudacz, I don't think there is
10 a motion before me. There was an oral motion this
11 morning, but -- I don't think it's timely. And it is
12 denied, then, if you want that. Although, there are some
13 interesting things in Mr. Cihigoyenette's argument. And
14 he argued well.

15 MR. KIDMAN: I think so, too.

16 THE COURT: All right. We'll see everybody next
17 Tuesday.

18 How about notice, though, of the continuance of
19 the motion; who is going to give that?

20 MR. FUDACZ: We can do it, your Honor.

21 THE COURT: Well, under the circumstances, why
22 don't we have Mr. Cihigoyenette do it this time.

23 MR. CIHIGOYENETTE: Okay, your Honor.

24 MR. KIDMAN: Thank you, your Honor. That's at
25 8:30?

26 THE COURT: Let's specially set it for later so

1 we can get everybody out of here first. Let's set it for
2 like 9:30; is that okay?

3 MR. CIHIGOYENETCHE: That's fine, your Honor.

4 MS. LEVIN: That would relate to the other
5 motion as well, the nine-member board?

6 THE COURT: Certainly.

7 That's already set for 8:30. I will put it over
8 to 9:30.

9 (Proceedings in the above-entitled matter
10 were concluded.)

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1 SUPERIOR & MUNICIPAL COURTS OF THE STATE OF CALIFORNIA
2 FOR THE COUNTY OF SAN BERNARDINO
DEPARTMENT H (RC) HON. J. MICHAEL GUNN, JUDGE

3 CHINO BASIN MUNICIPAL)
4 WATER DISTRICT,)
Plaintiff,)

5 vs.)

Case No. RCV-51010

6 CITY OF CHINO,)
7 Defendant.)
8

9 STATE OF CALIFORNIA)

10 COUNTY OF SAN BERNARDINO)

ss

11
12 I, Heather R. Paris, Official Reporter of the Superior
13 & Municipal Courts of the State of California, for the
14 County of San Bernardino, do hereby certify that the
15 foregoing pages numbered 1 through 47, comprise a full,
16 true, and correct computer-aided transcription of the
17 proceedings held in the above-entitled matter on
18 Monday, March 3, 1997.

19 Dated this 4th day of March, 1997.
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22

C.S.R.

23 Official Reporter, C-10294
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25
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HEATHER R. PARIS, C.S.R.