



Oral Proceedings

C.B.M.W.D. vs. CITY OF CHINO

10-24-97

Pages 1-148

**CONDENSED TRANSCRIPT AND WORD INDEX
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

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CHINO BASIN MUNICIPAL) CASE NO. RCV 51010

WATER DISTRICT.)

Plaintiff,)

vs.)

CITY OF CHINO, et al.,)

Defendants.)

REPORTER'S TRANSCRIPT OF ORAL PROCEEDINGS

DATE AND TIME: TUESDAY, OCTOBER 21, 1997

10:12 A.M.

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MICHELLE LAUFFER
CHINO BASIN WATERMASTER

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Tuesday, October 21, 1997, Rancho Cucamonga, CA

10:12 a.m.

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SPECIAL REFEREE: We are on the record. This is a hearing that we have scheduled to consider some of the issues that have been referred by the Court to consider. You all have the order to the referee. We will try to focus on those issues, although the briefs and reply briefs raised questions that I would like to ask in order to more fully understand how to make a recommendation to the Court.

Before I talk about how I am thinking about these issues to start with, I would like to have everyone introduce themselves so I have some sense of who's connected to which party. And if you would start around the table first, that would probably be most helpful for the reporter, since she's going to have to sort out who is speaking. And I've asked her to go ahead and interrupt if she needs to if I'm unable to keep more than one person from talking at once. So would you --

MR. SCHATZ: John Schatz for Jurupa Community Services District.

MR. VAIL: My name is Eric Vail. I'm standing in for Bob Dougherty. We represent the City of Ontario.

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MR. McPETERS: My name is Tom McPeters. My clients are mutual water companies Fontana Union Water Company, San Antonio Water Company, West End Consolidated Water Company, and Monte Vista Irrigation Company.

MR. RYAN: And I'm Timothy Ryan. I'm general counsel for the Fontana Water Company.

MR. MARKMAN: Jim Markman representing the Chino Basin Watermaster Advisory Committee.

MR. LITTLEWORTH: Art Littleworth of Best, Best & Krieger representing Western Municipal Water District, the Cucamonga County Water District, and Kaiser Ventures.

MS. OUELLETTE: Michelle Ouellette of Best, Best & Krieger also representing Kaiser, Cucamonga, and Western.

MR. CIHIGOYENETCHE: Jean Cihigoyenette representing Chino Basin Municipal Water District.

MR. KIDMAN: Art Kidman representing Monte Vista Water District.

MR. GUTIERREZ: Jimmy Gutierrez representing the City of Chino.

MS. LEVIN: Marilyn Levin of the Attorney General's Office representing the State of California.

MR. KENNEDY: Good morning. Steve Kennedy

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1 representing Three Valleys Municipal Water District.
 2 SPECIAL REFEREE: Would the people in the back
 3 of the room introduce themselves briefly.
 4 MS. STEWART: Traci Stewart, Chief of Watermaster
 5 Services.
 6 MR. DeLOACH: Robert DeLoach, general manager of
 7 Cucamonga County Water District.
 8 MR. BLACK: Gerald Black, Director of Operations
 9 for Fontana Union Water Company.
 10 MR. TEAL: Mike Teal, Director of Public Works,
 11 City of Ontario.
 12 MR. JAMES: Ed James, general manager for Jurupa
 13 Community Services District.
 14 MR. CHELEDEN: Chris Cheleden representing the
 15 City of Chino Hills.
 16 MR. BOYER: David Boyer representing Monte Vista
 17 Water District.
 18 MR. GRINDSTAFF: Joe Grindstaff. I'm the general
 19 manager, Monte Vista Water District.
 20 MS. JOHNSON: Josephine Johnson, director for
 21 Monte Vista Water District.
 22 MR. RICE: Bill Rice. I'm with the Regional
 23 Water Quality Control Board.
 24 MR. NORTON: Bill Norton, Regional Water Quality
 25 Control Board.

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1 MR. CRAIG: Ron Craig, City of Chino Hills Water
 2 management.
 3 MR. RODRIGUEZ: Arnold Rodriguez, general manager
 4 for Santa Ana River Water Company.
 5 MR. HAGERMAN: I'm Jack Hagerman with the State
 6 of California Department of Corrections, CIM.
 7 MR. CROSLY: David Crosley, water environmental
 8 manager, City of Chino.
 9 SPECIAL REFEREE: Okay. Thank you. There's some
 10 people placed at the board --
 11 MR. WILDERMUTH: Mark Wildermuth, consultant.
 12 MR. WHITE: Charles White, Department of Water
 13 Resources, Southern District, in Glendale.
 14 MR. De BERARD: Robert De Berard, ag pool.
 15 SPECIAL REFEREE: That's a crowd.
 16 I would like to go through just briefly what I
 17 have been thinking in terms of the key issues and the
 18 compelling reason question. And then I have quite a few
 19 questions and I'm wondering if there might be some way
 20 to designate perhaps a spokesperson or two for the
 21 parties in opposition and for the parties in support of
 22 the motion on a nine-member watermaster board issue to
 23 start with, to address the main questions, perhaps. And
 24 then if there are additional comments that anyone wishes
 25 to make, maybe those could briefly be added. I don't

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1 want to keep anyone from participating, but I'd like to
 2 perhaps be efficient if possible.
 3 MR. LITTLEWORTH: I think Jim Markman is going to
 4 take the lead for those of us supporting the motion.
 5 And some of the rest of us may have some comments, but I
 6 think he'll be taking the lead.
 7 SPECIAL REFEREE: And for the opposition?
 8 MR. CIHIGOYENETCHE: I think Art Kidman.
 9 SPECIAL REFEREE: Okay with you, Mr. Kidman?
 10 MR. KIDMAN: I'll be glad to speak for my client.
 11 To the extent the others agree --
 12 SPECIAL REFEREE: Right.
 13 MR. KIDMAN: I'd expect that they'd indicate so.
 14 SPECIAL REFEREE: That's fine.
 15 We have one new arrival. Could you identify
 16 yourself.
 17 MR. RUDINICA: I'm Mike Rudinica, general
 18 manager, Chino Hills.
 19 SPECIAL REFEREE: I see the key issue as being
 20 if there is a compelling reason not to grant the motion
 21 to appoint a new watermaster and in particular a
 22 nine-member watermaster board as proposed. I read the
 23 briefs and reply briefs, and I think the issue boils
 24 down to a question of whether a compelling reason would
 25 be that such a nine-member board would not act

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1 responsibly and effectively to preserve both the water
 2 quantity and water quality of the basin and to maximize
 3 the beneficial use of the basin and do everything that
 4 may be entailed in carrying out the purposes of the
 5 physical solution and to adhere to the requirements of
 6 Article 10, Section 2.
 7 I think a part of the compelling reason issue
 8 involves the question of whether there is some
 9 watermaster autonomy to carry out the physical solution,
 10 autonomy as opposed to the authority of the advisory
 11 committee, and if that part of the judgment structure
 12 that there is some autonomy is something that has to be
 13 protected. Water quality appears to be a very central
 14 issue and proponents of the motion have indicated in
 15 their pleadings that they take the position that the
 16 Regional Water Quality Control Board is the entity that
 17 should be responsible for water quality issues. And the
 18 question becomes then, in terms of the water quality
 19 component, what the ability is and the likelihood would
 20 be of the nine-member watermaster to fully perform all
 21 the functions intended that be performed under the
 22 judgment including quality and quantity.
 23 So I basically see two ways to go. One would be
 24 to recommend to the Court that it grant the motion for
 25 appointment of the interim -- for appointment of the

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1 nine-member board as an interim appointment with an
 2 order to produce for the Court within fairly short but
 3 reasonable amount of time a program or plan as to how it
 4 will proceed to carry out this potentially separate and
 5 important function under the judgment. An alternative
 6 way to proceed would be to recommend that the motion be
 7 denied. In either event, it seems like it may be very
 8 useful to the Court to have the Court order an
 9 independent review, an independent technical expert
 10 review of the status of the operating -- of the optimum
 11 basin management program and its components and to make
 12 recommendations to the Court.

13 So I have some questions -- quite a few
 14 questions, actually -- and I'd like to go into those
 15 questions, because I think that in discussing your
 16 different views of what the issues are and how they
 17 should be addressed would help me think further about
 18 these options of how to proceed in terms of
 19 recommendations to the Court.

20 I have some really basic questions. And I have
 21 been not talking to anyone and not asking any specific
 22 questions so I apologize if these are so very basic.
 23 You may not be able to believe that I don't know the
 24 answer, but I am neutral and I am from Northern
 25 California and I do not know what you are doing day to

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1 day.

2 So my first question is: Who is the interim
 3 watermaster right now?

4 MR. MARKMAN: I can answer that. The interim
 5 watermaster right now is Chino Basin Municipal Water
 6 District. They're watermasters -- I think they're
 7 interim watermaster technically because what we have
 8 been working -- Mr. Cihigoyenette and I have been
 9 trying to work out an interim watermaster agreement with
 10 Department of Water Resources. We're still in the
 11 middle of that process.

12 SPECIAL REFEREE: Right. Because I have the
 13 court's order that ordered that DWR be the interim
 14 watermaster so that still has not been accomplished but
 15 you still intend to --

16 MR. MARKMAN: We're trying.

17 SPECIAL REFEREE: -- do that.

18 MR. MARKMAN: We're trying to do that. I don't
 19 know if any of us can predict if that will actually come
 20 to fruition or when. For example, I'm not sure anymore
 21 that this process will be concluded before that process
 22 would have generated an agreement. It's taking a long
 23 time and there are some good reasons for that. DWR has
 24 some problems particularly with respect to personnel
 25 policy that they have to work through before they can

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1 enter into this arrangement. So while we have tried, I
 2 think we have -- everybody has tried, I can't tell you
 3 that will ever happen before this motion is decided.

4 SPECIAL REFEREE: Okay.

5 MR. MARKMAN: So Chino Basin Municipal Water
 6 District is -- so far as we're concerned is the interim
 7 watermaster under the constraints of the court's
 8 order -- that kind of restricts what they can do on
 9 personnel and other matters. And the watermaster
 10 services director is having a lot of problems also
 11 because of this situation moving through audits and
 12 things that need to get done, reports that need to get
 13 done. So we're all in kind of a limbo we would like not
 14 to be in.

15 SPECIAL REFEREE: But if the motion were denied,
 16 then the order to appoint DWR as the interim watermaster
 17 would still be in effect.

18 MR. MARKMAN: We'd still be attempting to
 19 implement it unless the Court ordered something
 20 different. But that's going to require an agreement
 21 that's satisfactory to the state, Chino Basin Municipal
 22 Water District, and the advisory committee. And there
 23 are difficulties, I think principally involving the
 24 structure of state government, that are impeding us.

25 SPECIAL REFEREE: And the agreement you're

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1 referring to is an agreement that would satisfy DWR's
 2 concern about personnel?

3 MR. MARKMAN: That and other concerns they have,
 4 yes.

5 SPECIAL REFEREE: Is there any -- anything that's
 6 an at-issue other than personnel type issues?

7 MR. MARKMAN: There are things at issue which
 8 concern -- Jean could speak to this maybe better than I
 9 could, but there are also concerns Chino Basin has about
 10 exposure, having responsibility and yet not control of
 11 employees, having responsibility and liability exposures
 12 since they have to -- to this time they would have to
 13 still be the employees of the watermaster staff on loan
 14 to the Department of Water Resources. The different
 15 responsibilities and exposures and obligations of Chino
 16 Basin Municipal Water District are also at issue.

17 And to the advisory committee, the independence
 18 of the employees, which is one of the reasons we got to
 19 this point, is very important. That is, independence
 20 from Chino Basin Municipal Water District. They
 21 physically separated, but they haven't separated from
 22 the point of view of the personnel system. So all these
 23 things are still in play.

24 MR. CIHIGOYENETTE: That's one of the concerns
 25 of Chino Basin is that these employees, watermaster

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1 staff, technically continue to be Chino Basin employees.
 2 And one of the areas of concern in the agreement with
 3 the state Department of Water Resources is how are these
 4 employees going to be handled? Who will supervise them?
 5 Who will ultimately be responsible for what these
 6 employees do? And there's been a give and take with the
 7 state because they're trying to figure out exactly how
 8 to classify these employees or if they want to take the
 9 employees over under their wing entirely.

10 And so I received a phone call last week from
 11 Mr. Sandino (phonetic) indicating that they would be
 12 forwarding the most recent version of an agreement for
 13 us to review and bring before our respective bodies to
 14 approve, comment on. So I would expect that to come
 15 down the line any day now.

16 MR. MARKMAN: Except that other contacts from DWR
 17 representatives with the watermaster staff indicate that
 18 their human resources or personnel people are going to
 19 want to interview the watermaster services staff
 20 members, and that may precede us receiving this next
 21 draft which is already now five or six weeks after the
 22 last draft was delivered to us. Just to give you an
 23 idea of the time lines that are going on here. Month,
 24 maybe two months between drafts while DWR wrestles with
 25 these problems.

17

1 SPECIAL REFEREE: But there's a process that's
 2 continuing?

3 MR. MARKMAN: There is a process that's
 4 continuing.

5 SPECIAL REFEREE: And if those issues are
 6 resolved and DWR enters into the agreement, then DWR
 7 would be the interim watermaster?

8 MR. MARKMAN: So long as DWR, the advisory
 9 committee, and Chino Basin Municipal will enter into the
 10 agreement. Otherwise we would have to report to the
 11 Court that we couldn't accomplish the agreement the
 12 Court sent us off to attempt to accomplish.

13 So I can't sit here and tell you my client or
 14 Jean's client will vote for that ultimate draft that is
 15 sort of the bottom line of DWR. We don't know.

16 MR. CIHIGOYENETCHE: We haven't seen it yet so
 17 it's impossible to tell.

18 SPECIAL REFEREE: Well, it raises interesting
 19 questions about the authority of the Court to appoint a
 20 watermaster of its choice.

21 MR. MARKMAN: Well, but that watermaster would
 22 have to agree to serve on terms that -- acceptable to
 23 it. And the court's order also directed our two clients
 24 to go out and try and negotiate this. That's what the
 25 order said, so

18

1 SPECIAL REFEREE: Right.

2 MR. MARKMAN: It's -- and we are attempting this.

3 MR. KIDMAN: I might add that although the
 4 interests that I represent, my client and those that
 5 I've been asked to speak for, are not in favor of the
 6 nine-member watermaster -- for reasons that I suppose
 7 we'll get into -- but I don't think that there's anybody
 8 in the whole basin that's very interested in seeing a
 9 loss of local control or at least some measure of
 10 maintaining local control. And having a state receiver,
 11 in effect, appointed is not something that any of us are
 12 really looking forward to. So if that's the outcome of
 13 one of your two alternatives, I think we might have some
 14 difficulty with that.

15 SPECIAL REFEREE: I was confused by the fact that
 16 there had been an order, and I had no information on how
 17 the process had been going.

18 Let me turn to an issue that was addressed
 19 somewhat in declarations but not very clearly anywhere
 20 in the pleadings, and that's what the status is, if
 21 there is an optimum basin management program per se in
 22 place, if it's one document, or is it still an
 23 amalgamation of policies and plans as it was when
 24 Judge Turner heard his motion and made his order in
 25 1989, I think it was?

19

1 Can someone clarify that for me.

2 MR. MARKMAN: Well, I don't have a lot of
 3 information on that. I just asked Traci Stewart.
 4 Evidently there have been a number of studies done since
 5 that order was issued, but nobody can put their hands on
 6 a document and say this is the document or the product
 7 that was meant to constitute that document. Either --
 8 and I don't think -- I know that's from the advisory
 9 committee's point of view. And I don't know if Jean has
 10 different information whether Chino Basin Municipal has
 11 such a document.

12 MR. CIHIGOYENETCHE: Not to my knowledge.

13 SPECIAL REFEREE: So no entity has -- the
 14 watermaster or advisory commission -- committee or
 15 anyone has produced something that is the optimum basin
 16 management program in all this time since the judgment?

17 MR. KIDMAN: We think that that's symptomatic of
 18 the --

19 SPECIAL REFEREE: Well, first, Mr. Kidman, is
 20 that the case in your view?

21 MR. KIDMAN: Yes, it is the case in our view.

22 SPECIAL REFEREE: When Judge Turner heard the
 23 motion and issued his ruling in 1989 --

24 MS. BRENNER: Right.

25 SPECIAL REFEREE: -- that ruling required that a

20

1 single document, a single text try to be created within
2 two years, I think. Were efforts made at that time to
3 do that? And what were they?

4 MR. MARKMAN: There is somebody other than a
5 lawyer who might be better able to address that, if you
6 want to take a statement -- there's a consultant here.

7 SPECIAL REFEREE: I need to see if I can get as
8 much information as possible. If no one objects, I
9 would be happy to hear from Miss Stewart.

10 MS. STEWART: If no one will object, maybe you
11 can let Mark -- there is a document, the Water Resources
12 Management Study. And he can give you kind of the
13 history and the status really briefly if you want.

14 SPECIAL REFEREE: Now you're referring to
15 Mr. Wildermuth's declaration about a study that was done
16 for various producers?

17 MR. WILDERMUTH: By a task force that consisted
18 of Chino Basin, Western M.W.D., and Chino Basin
19 Watermaster.

20 SPECIAL REFEREE: So the watermaster was part of
21 the study?

22 MR. WILDERMUTH: Correct. It was about a million
23 dollar study. Took place over three or four years. It
24 did end up recommending plans that could be implemented.
25 It came up with a series of alternatives that could be

21

1 implemented.

2 SPECIAL REFEREE: What is that study called, and
3 when was it done?

4 MR. WILDERMUTH: I don't have the exact dates. I
5 would say about 1995 it was completed, the final report.

6 SPECIAL REFEREE: And tell me again the scope of
7 that report.

8 MR. WILDERMUTH: It -- off the top of my head --
9 I was in it. I did participate in it. We developed a
10 series of planning tools and collective planning data
11 and tried to develop a series of alternative ways to
12 manage the basin. And we simulated them on a computer,
13 and we estimated the cost and stopped short of
14 developing implementation plans.

15 SPECIAL REFEREE: When you say managing the
16 basin, was it looking at water quality issues as well as
17 storage and replenishing?

18 MR. WILDERMUTH: That's absolutely right. It
19 dealt with storage limits. It dealt with water quality
20 in the basin and how to develop the imparate (phonetic)
21 areas in the future.

22 SPECIAL REFEREE: Was that plan or study adopted
23 by the watermaster or the advisory commission --
24 committee?

25 MR. WILDERMUTH: I'm going to defer to Traci on

22

1 that. It was --

2 MS. STEWART: It was -- okay.

3 SPECIAL REFEREE: By both?

4 MS. STEWART: These people participated.

5 SPECIAL REFEREE: It was adopted by both the
6 watermaster and the advisory committee. And what was it
7 adopted as being?

8 MR. GRINDSTAFF: It was adopted, but it had
9 alternatives in it, and the next stage was to actually
10 develop a plan that we would follow. And the advisory
11 committee voted against funding the development of an
12 implementation plan.

13 SPECIAL REFEREE: Would you identify yourself.

14 MR. GRINDSTAFF: Joe Grindstaff.

15 SPECIAL REFEREE: And the next fellow who's
16 speaking?

17 MR. JAMES: Ed James. I was chief of
18 watermaster service at the time that occurred. And that
19 was -- the study was to comply with Judge Turner's
20 request, and it looked at the ideas and we looked at
21 water quality and various management schemes. And it
22 went into place about 1990 and went on for about four or
23 five years and had several meetings. We went through --
24 the engineers did the studies, and out of that there
25 were several proposals. These are things you got to do.

23

1 Management schemes. The problem is, the program ended
2 about '94, and since then we have not implemented the
3 next phase. And that's kind of where we are at this
4 point.

5 SPECIAL REFEREE: Tell me what the next phase
6 would be.

7 MR. JAMES: There were about four or five
8 alternative management schemes, and the idea was to take
9 those and take the preferred plan and look into more
10 detail the economics and how to implement that plan.

11 SPECIAL REFEREE: But a preferred plan was
12 identified?

13 MR. JAMES: I believe that's correct.

14 SPECIAL REFEREE: And would -- back to Mr. Kidman
15 and Markman. Would the preferred plan identified
16 constitute your optimum basin management program?

17 MR. KIDMAN: I can't answer that.

18 MR. MARKMAN: I think the advisory committee
19 would have to answer that. What I will tell you is that
20 I think this all boils down to -- why we're here boils
21 down to how the costs would be allocated to achieve the
22 goals. I doubt that the plan identified goals. People
23 didn't agree with the question as how to allocate the
24 cost of implementation that has brought us all here
25 so -- and this is -- we're all here together. Not just

24

1 the advisory committee and the appropriators, but we're
2 all here together.

3 SPECIAL REFEREE: So would it be the advisory
4 committee's view, then, that a program without an
5 element that defined how costs would be allocated is not
6 a full optimum basin management program?

7 MR. MARKMAN: I think that everybody should
8 concur with that, including the advisory committee,
9 because you're not going to implement anything until
10 you -- if you're going to implement something, somebody
11 has to pay it. Somebody has to agree on a budget, on
12 how to implement it, and how to fund it. And so I
13 believe Traci wanted to --

14 SPECIAL REFEREE: Traci?

15 MS. STEWART: Part of the problem with the
16 implementation was that there were certain components
17 that hadn't been resolved during the development. For
18 example, land-use conversions, which are identified in
19 the judgment to be done according to a certain
20 methodology, that methodology wasn't able to be
21 implemented the way that it was identified in the
22 judgment.

23 And so once the study meetings were completed,
24 instead of saying, okay, we want to implement this plan,
25 what everybody realized was, we can't implement this

25

1 plan because we know that we can't accomplish these
2 land-use conversions by this method. So instead, what
3 the advisory committee members talked about and have
4 since been working on is, they talked about coming to
5 resolution on some of the individual components that, in
6 turn, turn into assumptions in order to run these -- the
7 tools that Mark described and to better define how this
8 plan would be implemented. So land-use conversions was
9 one.

10 A recharge master plan was another component we
11 didn't know. We knew that we would be short the ability
12 to recharge, but we didn't know how much and how we
13 would accomplish it where. So those are things that
14 we've undertaken since then, and we've kind of had some
15 of those things come to a stop because of the question
16 with regard to watermaster. But they've all been in the
17 works, you know, kind of methodically, one at a time,
18 we've been attacking those various components.

19 SPECIAL REFEREE: I can't tell whether it's the
20 position of the parties that this is a dynamic process
21 and there would never be an optimum basin management
22 program in place that's in one document one time, or
23 whether that's not the case?

24 MR. KIDMAN: That's not the position of the
25 people that I represent.

26

1 MR. MARKMAN: And I don't think --

2 MR. KIDMAN: We believe that there should be a
3 plan. We believe that this approach taken by the
4 advisory committee has been to study it endlessly, to
5 filibuster it to death and make sure that they avoid
6 coming up to an agreed plan and a funding mechanism.

7 SPECIAL REFEREE: So what Miss Stewart described
8 as additional work that's being done to resolve various
9 issues you would describe as filibustering?

10 MR. KIDMAN: Yes.

11 MR. MARKMAN: I'm going to try to answer your
12 questions without casting around blames or, you know,
13 reaching back into the past and try to find out who
14 precluded what. Art wasn't here at that time, and
15 neither was I, representing the parties we represent
16 now. Suffice it to say, I think that the advisory
17 committee would like to be able to agree upon a plan
18 like that that isn't objected to by a minority vocally
19 through endless court motions, which is what's happened.
20 So, yes, we would like to achieve that. We would like
21 to negotiate it because that's what it's going to be and
22 satisfy the minority, but you're never going to get one
23 that tries to fault over the appropriators who are
24 parties to this judgment. Let's be realistic. And the
25 same --

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1 SPECIAL REFEREE: One of my concerns is that in
2 the various ways to proceed, if there were an interim
3 appointment or not, it would seem important to give the
4 Court some sort of way to have -- to be reassured that
5 the planning process is indeed occurring and will have a
6 product that is agreed to be the optimum basin
7 management program within a reasonable amount of time,
8 no matter who the watermaster is. And my questions are
9 important, I think, because there seems to have been a
10 terribly long history between when the judgment has said
11 there is to be such a program and made it an important
12 part of the judgment, and we need to talk about whose
13 obligation it is to accomplish it. But it's an
14 important part of the judgment. It's now almost
15 20 years later, and if there were recommendation to the
16 Court one way or another on the watermaster appointment,
17 I think the Court should be looking for some reassurance
18 within a reasonable amount of time as to how and whether,
19 this can be accomplished. This optimum basin management
20 program project seems to be ongoing.

21 MR. MARKMAN: I think if the referee wants to
22 recommend to the Court that as part of your package
23 someone with a fresh look comes in and looks at that
24 process -- where it is and what it needs to accomplish
25 and how it can move -- as a report to the Court, I don't

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1 think we would resist that. We're not hiding the ball.
2 And that might be helpful to the new watermaster board
3 as well.

4 SPECIAL REFEREE: Mr. Kidman?

5 MR. KIDMAN: We would agree that there -- that a
6 plan and a time frame both ought to be mandated.

7 MR. GRINDSTAFF: Can I add our -- one of the
8 reasons --

9 SPECIAL REFEREE: Mr. Grindstaff?

10 MR. GRINDSTAFF: Joe Grindstaff again.

11 -- that the minority feels so strongly is in fact
12 because at the completion of the development of this
13 plan, some of the other parties specifically said to
14 more than one other party that they intended to throw
15 the study in the trash, that they had no intention of
16 implementing it.

17 SPECIAL REFEREE: I knew we'd have some colorful
18 exchanges here, but I'm interested in what right now the
19 position of the parties --

20 MR. GRINDSTAFF: And right now we had a meeting
21 last Thursday where we talked about some of the issues
22 that need to be addressed, such as how much water is
23 actually even in the basin and things like the 85-15
24 rule. And those issues were postponed until we could
25 resolve the issue of who the watermaster is. And from

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1 our perspective, it's deliberate avoidance of developing
2 a plan.

3 SPECIAL REFEREE: At this point could the parties
4 agree on what needs to be included in an optimum basin
5 management program?

6 MR. GRINDSTAFF: Yes. I would think.

7 SPECIAL REFEREE: Ultimately what has to be in
8 the program? Not what you could put in it right now,
9 but what ultimately would be included? Is that
10 something that an agreement can be reached on?

11 MR. MARKMAN: Oh, I think we can agree on the,
12 you know, the content of the plan as distinguished from
13 cost allocations and things like that.

14 SPECIAL REFEREE: Well, for instance, can
15 everyone agree that the cost allocation issue has to be
16 addressed in part of the program?

17 MR. MARKMAN: Yes.

18 MR. KIDMAN: Yes.

19 SPECIAL REFEREE: Is there any disagreement about
20 what would go in this program no matter how hard it
21 would be to accomplish?

22 MR. GUTIERREZ: Yes.

23 SPECIAL REFEREE: There's disagreement? What is
24 the disagreement?

25 MR. GUTIERREZ: Well, for example, there I would

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1 say the majority refuse to acknowledge Mark Wildermuth's
2 study about the loss of water that is occurring, and
3 they refuse to recognize that in their rules with
4 respect to water storage, I mean, there's just an
5 absolute refusal to recognize facts. And I believe that
6 spills over in not only identifying issues but honest
7 working to resolving those issues. We might
8 theoretically be able to say these are the issues that
9 need to be resolved --

10 SPECIAL REFEREE: That's what I'm asking.

11 MR. GUTIERREZ: Okay. We may be able to do that,
12 but I have serious doubt that we could move beyond that.

13 SPECIAL REFEREE: Well, it seems that that would
14 be a very good start.

15 MR. VAIL: Excuse me for interrupting. I believe
16 Mr. Teal, City of Ontario, has a question.

17 MR. TEAL: Yes, ma'am. As one of the major
18 producers, you know, one of the impressions here that's
19 been left is that somehow the basin management process
20 is in chaos, when in fact there's some very critical
21 issues that need to be resolved in terms of basin
22 cleanup and the transition from agricultural to urban.
23 And so in fact the basin hasn't really been in chaos.
24 We consider the basin management planning process to be
25 a dynamic process, to be an ongoing process, as we

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1 develop a better model of the basin to better identify
2 what are the losses, how is the contamination of the
3 lower end of the basin, how is that impacting the
4 producers. There's very critical economic issues here
5 that need to be recognized.

6 When Ontario entered into the adjudication back
7 in 1978, we anticipated the transition from agricultural
8 to urban and the transitioning of those water rights.
9 Ontario is about to inherit most of the water in the
10 lower part of the basin that in fact is contaminated,
11 and we clearly recognize the need to systematically
12 clean that part of the water table up.

13 SPECIAL REFEREE: Let me ask you, Do the
14 producers in the southernmost part of the basin have a
15 plan related to water quality issues?

16 MR. TEAL: That's what we're trying to develop.
17 And right now one of the problems has been that the past
18 contamination hasn't been properly regulated, we
19 believe.

20 SPECIAL REFEREE: But I'm curious about whether
21 the producers in the southern part of the basin are
22 actually working on a program. My second part of that
23 question is whether that is intended to become or could
24 ever be part of the optimum basin management program.

25 MR. TEAL: That's part of this whole study that

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1 we spent a million four hundred thousand dollars to
 2 complete was to start the process of that basin
 3 management planning so that we could identify what the
 4 problem is. And we feel we've identified the
 5 contamination problem. We have a working model now. We
 6 know generally that, yes, there are losses to the basin,
 7 and we need to correct that through storage limits. And
 8 we're develop- -- we think we have a plan now for
 9 storage limits. We need to now develop a plan of how
 10 are we going to clean up the lower part of the basin,
 11 which is going to cost multiple millions of dollars.

12 SPECIAL REFEREE: So your view would be that has
 13 to be an element in whatever the program is. I don't --
 14 I'm not --

15 MR. TEAL: Yes, ma'am.

16 SPECIAL REFEREE: -- interested right now in
 17 delving into all the specific elements. I'm much more
 18 interested in whether there is concurrence that you
 19 could get together and at least provide a comprehensive
 20 description -- an outline, I guess, scope -- of what
 21 would be in the optimum basin management program. I
 22 think it's a tool that could be very helpful to the
 23 Court to have and to use as a measure of the success of
 24 whatever watermaster is appointed. And is it possible
 25 to get that tool in place? That would be a very

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1 important way for the Court to keep track of the success
 2 of the appointment.

3 Mr. Littleworth.

4 MR. LITTLEWORTH: There is one part of the water
 5 quality program which is underway in the lower part of
 6 the basin, and that is, a desalter is under
 7 construction, parts of it anyway. And I mean, that's
 8 one way in which the pollution in the lower part of the
 9 basin will be dealt with. It's part of a larger
 10 program, and you've got to put that in context with the
 11 recharge of the basin and how that's handled and where
 12 that recharge occurs. Lot of other things. But it's
 13 not as though nothing is being done at the present time.

14 SPECIAL REFEREE: Maybe I'm not asking my
 15 questions clearly. I'm not assuming one way or another
 16 as to what's been accomplished. I'm just interested if
 17 all the things that have been accomplished and all of
 18 the things on Miss Stewart's list of things in process
 19 and all the things that are prospectively included were
 20 put together, can everyone agree to that list? Not as
 21 to how they'd be resolved but just what needs to be
 22 resolved. What comprises this program?

23 MR. MARKMAN: From our point of view on the
 24 advisory committee, the answer to that question is yes.
 25 Without blaming anybody for not getting to it up till

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1 now or getting it done, the answer is yes. I can't
 2 believe we can't agree on what ought to be the contents
 3 of such a plan.

4 SPECIAL REFEREE: Mr. Kidman.

5 MR. KIDMAN: I think the answer you're getting
 6 from everyone is, yes, theoretically we should be able
 7 to agree to a plan. There is a lot of baggage that
 8 comes along with this, without question.

9 SPECIAL REFEREE: But we weren't going to talk
 10 about that too much; right?

11 MR. KIDMAN: The desalters are mentioned -- the
 12 desalters, and you ask what have the people in the
 13 southern part of the basin been doing. The southern
 14 part of the basin clamored, campaigned, worked like heck
 15 to get those desalters put into place, get the program
 16 approved. They got other people's money brought in to
 17 build them. The biggest hurdle that they faced -- and,
 18 Jim, I was part of this -- was getting watermaster
 19 approval on how to pay for the water that's extracted to
 20 go through the desalters. That hurdle lasted for three,
 21 maybe five years before it was resolved. It was
 22 filibustered.

23 SPECIAL REFEREE: I can appreciate that the
 24 elements of this will have battles forevermore on some
 25 of them, but it seems that a measure for everyone to

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1 have, including the Court, would be to have a program
 2 that is defined, whether it's accomplished now or in the
 3 future. There's no --

4 MR. KIDMAN: Absolutely.

5 SPECIAL REFEREE: There's no mark for the Court
 6 to go to to assess what is happening in this basin.

7 MS. LEVIN: Marilyn Levin, State of California.

8 I'm just going to jump on what Mr. Kidman just
 9 said. And I think your question is important, and I
 10 sadly have to say that even though everyone in this room
 11 is saying that they could agree on the elements on the
 12 one hand, I agree with Mr. Kidman that there's a lot of
 13 baggage. And so my conclusion is that your first
 14 statement was that you were considering ordering an
 15 independent technical review of the optimum basin
 16 management plan, and as the State of California and the
 17 largest landowner in the basin, I believe that the only
 18 way that the Court could get a document that would
 19 include the elements would be to have some type of
 20 independent technical firm, not involved in the basin
 21 possibly -- and I know everyone is going to disagree
 22 with me -- assist -- have the watermaster or the entire
 23 basin pay for it and have them work with the various
 24 entities to put in the elements. It seems to me that if
 25 we're paying for it, it's not going to drag out for as

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1 long as it might if someone -- if a firm weren't hired
2 to assist us to do that.

3 And then once we had the elements in it and we
4 didn't address how -- the other controversies into how
5 to implement the elements, I think then the Court could
6 utilize that. That's -- that's my opinion on how to
7 accomplish that. I don't think we can do it without
8 assistance.

9 MR. KIDMAN: Since Mrs. Levin agrees with me, I
10 will agree with her. I think something independent
11 really needs to be done.

12 SPECIAL REFEREE: One of the -- I'm changing
13 scope of the question here to something else. I think
14 that one of the issues that seems to underlie a lot of
15 the briefing discussion was whether the watermaster is
16 intended to be separate from the advisory committee.
17 What is the authority in the judgment for saying that
18 they really are or are not separate? One way to ask the
19 question is whether there is any limit to what the
20 advisory committee can mandate that the watermaster do
21 if the advisory committee does so with 80 votes. The
22 main concern that I have -- and I have a number of
23 questions around this, but the main concern that I have
24 is whether there is some independence in the watermaster
25 intended in the judgment and crucial for the judgment to

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1 succeed and what that is.

2 And when we were trying to draft the questions to
3 brief, it seemed important to distinguish between
4 discretionary and mandated and administrative --
5 ministerial actions. The briefing wasn't very helpful,
6 but I think the questions weren't necessarily very
7 helpful in the first place. When I read through the
8 judgment, it seems there is very little that the
9 watermaster can do except upon recommendation of the
10 advisory committee. It can't apparently act to adopt
11 its own rules and regulations or its own budget or
12 variances in elements in the budget or do studies. And
13 those, to me, are the essential functions of something
14 like a watermaster. And so there's very close
15 oversight, to say the least, by the advisory committee
16 of watermaster functions. And yet there seems to be a
17 concept that there is a special relationship of the
18 watermaster and the Court, that the watermaster may
19 somewhat suggest to be an arm of the Court, that there's
20 some special function of the watermaster with regard to
21 the optimal basin water management program and to
22 carrying out the physical solution in a way which is in
23 the interest of the whole to get away from the tragedy
24 of the commons issue where producers' interests are
25 being protected by producers. And there has to be

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1 someone who can help the Court deal with the issues and
2 their protection of resources for the whole.

3 And that seems to be, to me, how the issues boil
4 down in the briefing. And the question is, Is there
5 some separate function of the watermaster particularly
6 related to the optimum basin management program that
7 needs to be kept separate, and is there anything other
8 than the optimum basin management program that falls
9 into that category that's significant?

10 MR. MARKMAN: Well, let me try to respond to
11 that. I thought you asked the question on target, and I
12 really tried to answer it. Because I have one advantage
13 here representing the advisory committee. My baggage
14 only goes back to last April because I really wasn't
15 even involved in this process, and I don't come in angry
16 at anybody, nor have I traded insults with anybody. I'd
17 rather get into --

18 SPECIAL REFEREE: Yet.

19 MR. MARKMAN: It's early today.

20 But, first of all, one of the questions you
21 asked, is there some absolute necessity for there to be
22 a separate watermaster? I don't believe so, and I
23 briefed that. But the fact is there is a separate
24 watermaster. And what the genesis of it is, whatever
25 the district that promoted this adjudication paid

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1 Mr. Stark, hosted all the meetings and negotiations and
2 spurred on this adjudication, carved out for itself a
3 role as watermaster, which does two things. The first
4 thing it does is, it's supposed to operate the
5 bookkeeping operations of a watermaster -- the water
6 accounts, the metering, the many, many meetings of the
7 pools, the advisory committee, the watermaster. There's
8 a whole lot -- this is a mini public agency operating
9 here, and it has operated that, and that's an important
10 function. That's a ministerial function.

11 It has another function under the judgment, and I
12 do -- I'm the one who used the phrase "arm of the
13 Court." I don't think it's an ombudsman for the general
14 public. I think that the watermaster, or Chino Basin
15 Municipal Water District at the time, if disagreeing
16 with the policy board, which is the advisory committee,
17 can take the matter to the Court and would have its
18 efforts funded by all the production and all the
19 producers, just as the advisory committee functions are
20 funded that way, and can bring to the Court anything
21 that alarmed it.

22 There are two kinds -- two ways that could
23 happen. One on a non-mandated decision. The
24 watermaster would then have to hold a hearing, make
25 findings, and issue a written decision still reviewable

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1 by the Court. Well, that's a hard process for the
2 watermaster just to disagree with a non-mandated
3 decision. So you can see the point was the policy
4 should be in the advisory committee. It should be
5 difficult for the watermaster to disagree, and then even
6 if the watermaster made that finding, that would be
7 reviewable up to the Court by the advisory committee or
8 any party.

9 On a mandated action, the only thing the
10 watermaster could do -- but it could do this, and it
11 could do this funded by all the production -- would be
12 to take the matter before the Court. So if you had an
13 optimum management plan that the advisory committee
14 recommended by mandated action by 80 or more votes, then
15 the watermaster at -- could take that matter up for
16 review to the Court and contest some or all of it.

17 If it was a non-mandated action, the watermaster
18 would give it a second hearing, a second review, produce
19 findings and a decision, and that would probably go on
20 up to the Court.

21 So I think that's an important function. It
22 takes the legal fees and the burden of doing that off of
23 individual parties who are in the minority. And really
24 that's -- to me, I think that there's no other way to
25 describe the two sets of watermaster functions because

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1 of the pervasive policy control that the producers
2 retain for themselves when negotiating this judgment.

3 Now, my view is other than the fact that you get
4 that court process paid for by production and you have
5 that watermaster sitting there -- the one we're
6 producing with -- we're suggesting, with all those
7 diverse interests, looking at the advisory committee's
8 product which obviously is the product approved by the
9 majority of the production which is controlled by -- by
10 our clients, Upland, Ontario -- the major appropriators
11 have the votes there -- you have a second round of
12 review by more diverse interests. That's what we're
13 seeking with this motion.

14 I personally don't think it would be a great
15 tragedy or the tragedy of the commons to merge the two
16 offices and let the advisory committee play the role,
17 now that we have completely distinct staff that's
18 physically separated and could work for any watermaster.
19 In fact, moreover, the advisory committee and the
20 watermaster entered into an agreement, as you know, the
21 famous facilities and services agreement which
22 essentially delegated over to the advisory committee
23 supervision of the staff to do all this stuff. And that
24 operated that way for a while. Then we had staff
25 operating under direction of the advisory committee by

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1 contract, and we had a lawyer, Dotzlemann (phonetic)
2 firm, in the middle trying to work with the staff
3 directed by the advisory committee but still
4 theoretically under the direction of Chino Basin
5 Municipal Water District, all of which created chaos --
6 SPECIAL REFEREE: I'll have to read the
7 transcript on this.

8 MR. MARKMAN: -- which brings us here. But there
9 are -- you know, the advisory committee is not -- I have
10 not been instructed to answer your question by saying do
11 away with an independent watermaster. It does perform
12 those functions. It is a cog in the process that
13 ultimately brings these issues to the Court. We think
14 it is useful to have a watermaster review the optimum
15 basin management plan. And if it agrees with the
16 minority that opposes that plan, it has two ways of
17 bringing the matter up to the Court, depending on what
18 the vote was, and paying for legal counsel to support
19 that position. So, you know, we think those are the
20 functions of it.

21 MR. LITTLEWORTH: If I could --

22 SPECIAL REFEREE: Yes.

23 MR. KIDMAN: We will get our turn; right?

24 SPECIAL REFEREE: Mr. Littleworth, your brief
25 talked about -- I think the reply brief made it clear

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1 that you thought that there were separate functions in
2 the watermaster and the advisory committee.

3 MR. LITTLEWORTH: Although I think one should say
4 that there are perfectly successful, enormously
5 successful adjudications that are run by the producers
6 alone where the watermaster is a committee of the
7 producers, and that's in San Gabriel Basin -- functioned
8 very, very well. And if you were to say could this
9 basin function the same way, I think my answer would be
10 yes.

11 SPECIAL REFEREE: In the situation in San Gabriel
12 where you have a minority that disagrees with something
13 like the advisory committee, is there any way for their
14 concerns to go to the Court short of them bringing those
15 concerns separately, individually? Is there someone
16 like a watermaster that --

17 MR. LITTLEWORTH: Oh, yeah. There -- in the
18 San Gabriel, the watermaster is a committee, and
19 obviously --

20 SPECIAL REFEREE: It is the advisory committee,
21 in essence?

22 MR. LITTLEWORTH: No. It's --

23 MR. MARKMAN: Yes. If you took the advisory
24 committee here and merged its function with the
25 watermaster, you would have San Gabriel.

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1 SPECIAL REFEREE: That would be the San Gabriel--
2 MR. LITTLEWORTH: Put the label "watermaster" on
3 it, you'd have it.

4 SPECIAL REFEREE: So in the San Gabriel
5 situation, if there is a minority --

6 MR. LITTLEWORTH: Have to go to court.

7 SPECIAL REFEREE: -- they would have themselves
8 to go to court. Is there any provision in that judgment
9 that their costs are covered by the whole to raise a
10 minority position?

11 MR. LITTLEWORTH: Not that I recall. Not that I
12 recall. But that isn't what is before us. I mean --
13 but when you're looking at a situation and the question
14 of whether or not you can have a successful
15 administration of the basin where the producers are
16 controlling it without some independent check on it,
17 San Gabriel stands for the answer that, yes, you can do
18 that.

19 That isn't what we have here. That isn't the
20 motion that's in front of the Court at the present time.
21 Although maybe in the long run, it would make some sense
22 to be moving in that direction. But that's not where we
23 are now.

24 I wanted to go back a little bit to the history.
25 I've not been deeply involved in all of the brief

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1 writing that's been going on except to be absolutely
2 amazed at how much paper could be generated over this
3 issue. I came back from vacation yesterday to find out
4 that Michelle wanted me to be here today, and so I read
5 the last of the briefs, and they -- a lot of them
6 emphasize the need for checks and balances. That's a
7 theme that runs through a lot of them.

8 I don't know how many people are still around who
9 participated in the negotiation and all of the meetings
10 out of which the judgment came. I just learned that
11 Jim Markman, as a very young lawyer, was there part of
12 the time. I didn't think he was old enough to do that.

13 MR. MARKMAN: Young? Not very young.

14 MR. LITTLEWORTH: But I think I can say -- and my
15 memory may not be as good among all things as I would
16 like it to be, but I think I could say that this idea of
17 checks and balances never came up in any of these
18 discussions. There was a -- there was a difference in
19 functions which sort of fell out naturally from what had
20 been occurring.

21 The Chino Basin district had gotten special
22 legislation to levy a small pump tax which was used to
23 finance the initial studies which ultimately led to
24 finding of overdraft and then the adjudication
25 negotiations. They hired the lawyer, Don Stark, who was

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1 also the lawyer which had represented Chino Basin in the
2 Santa Ana River settlement. That was in 1969. And in
3 1969 all of the upstream areas agreed to take on certain
4 responsibilities to the downstream people, to the
5 Orange County Water District. Chino was one of those.
6 And so the internal management program, then, that began
7 to develop was really an outgrowth of its obligations
8 that it could see that it was going to have to undertake
9 toward downstream people.

10 So the Chino Basin district used its lawyer that
11 had been representing them all long, Don Stark. It used
12 its engineering firm, the Montgomery firm, Bud Carroll,
13 who was then, I think, the president or the CEO. And
14 they had been involved in all of this. And they came
15 along with a study. The study indicated that indeed the
16 basin was overdrafted. The negotiations started before
17 1975 when Pasadena versus Alhambra rule was still
18 intact. When the Los Angeles versus San Fernando came
19 along, mutual prescription was not going to be the way
20 that we could proceed, and so things changed.

21 In all of that, the person, as I recall, who came
22 up with the idea of treating the -- all of the water
23 rights, water users, in different ways in three pools
24 was Don Owen, who was one of the persons who has filed
25 the declaration here. And it seemed to make sense that

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1 it would be better to treat, for instance, agriculture,
2 which was not increasing and did not want therefore to
3 be paying a pump tax for replenishment -- they could see
4 themselves gradually decreasing. They wanted to be
5 treated somewhat differently, and in fact, that has
6 occurred now.

7 Traci just mentioned that the land-use conversion
8 procedures which are -- in the judgment may not be the
9 ones that really work very well now. And if that's the
10 case, then you really are looking not at something that
11 the watermaster can do but maybe going back to the Court
12 and getting a modification of the judgment in a way that
13 makes that thing work.

14 But the idea was that as the agricultural lands
15 went out of production, the appropriators who were going
16 to take over the service would achieve those water
17 rights and would then use them to serve that land.
18 Whether those water rights are now of a quality where
19 you can pump them is a different question, although
20 there is no restriction in the judgment on where you can
21 pump from. Maybe there ought to be.

22 And when you really look at an effective
23 management plan, the pumping patterns become very
24 important. But you can't do that really except by
25 agreements, not in the judgment as it stands now.

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1 SPECIAL REFEREE: When the judgment was being
2 negotiated, what were the thoughts about having separate
3 watermaster with separate functions?

4 MR. LITTLEWORTH: I think very minimal. The
5 watermaster, at that point the district, had -- was the
6 member agency for the Metropolitan Water District so it
7 had access to supplemental water.

8 SPECIAL REFEREE: And it wasn't a producer from
9 the basin?

10 MR. LITTLEWORTH: No. It was the regional sewage
11 agency. It was beginning to develop a regional sewage
12 plan so it was going to control the reclaimed water. It
13 had -- it had a staff which had been collecting money,
14 and managing it and investing it and paying the bills
15 and so forth. It was very easy to move into an idea
16 that -- apart from whether the staff people wanted to
17 carve themselves a role or not, it was very easy for us
18 to move toward a watermaster which sort of continued the
19 kinds of things that was done.

20 But it's pretty clear, I think, if you read the
21 judgment, that the real power of management was to be
22 vested in the producers. And that's the way the whole
23 judgment had developed. It had developed with an
24 agreement among the producers. And as we look around
25 here and talk about plans and so forth, we maybe can

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1 agree on a plan, but it's always the implementation that
2 becomes the important thing. And unless there is really
3 substantial agreement among the producers, there isn't
4 going to be any real progress in this basin. And we've
5 seen the disputes along the watermaster thing have
6 basically brought a halt to any constructive work for
7 the last year or two, maybe longer.

8 I don't think -- I think checks and balances are
9 largely overrated in the discussion and the briefing
10 that's gone on because you are going to have to have
11 basic agreement among the producing people, or you're
12 not going to get very far. Because I think, among other
13 things, the kinds of things that need to be done are
14 beyond the judgment. All the judgment did was to say,
15 Everybody, you can pump a certain amount of water, and
16 if you pump more, you're going to have to pay for
17 replenishment. And has some storage provisions in it.

18 But the real problems of how do you clean up
19 pollution which started maybe 40 and 50 years ago --

20 SPECIAL REFEREE: Let me go to that.

21 MR. LITTLEWORTH: Okay.

22 SPECIAL REFEREE: When the judgment was being
23 negotiated --

24 MR. KIDMAN: Do we get to respond to all of
25 this at all --

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1 SPECIAL REFEREE: Yeah. But just a second.

2 MR. KIDMAN: -- rather than going on to new
3 questions?

4 SPECIAL REFEREE: When the judgment was being
5 negotiated, water quality was, as you just mentioned, an
6 issue already in the basin. Was it impossible to get
7 the agreement of the producers to water quality
8 term -- more magnitude, greater magnitude in the
9 judgment? Was it discussed?

10 MR. LITTLEWORTH: I think water quality was in
11 its infancy at that point.

12 SPECIAL REFEREE: The question, though, is
13 whether water quality was discussed and whether it was
14 decided not to include more detailed provisions on water
15 quality in the judgment and why?

16 MR. MARKMAN: I don't --

17 MR. LITTLEWORTH: I can't say that water quality
18 was discussed in the way that you are asking. It was
19 recognized that water quality was an issue. We had
20 already had a study by the Santa Ana Watershed -- not
21 the project authority, which is now SAWPA, but its
22 predecessor -- and had dealt with the water quality
23 issues.

24 And if you're looking at water quality plans --
25 can't remember the year that that was done, but it would

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1 have been probably in very early '70s -- there was a
2 real water quality plan. It involved barrier wells and
3 pumping water back upstream and replenishing up there
4 and so forth.

5 But the -- so what is now the Santa Ana Watershed
6 Project Authority's predecessor was then in existence.
7 So there was water quality efforts going on a watershed
8 basis, but with respect to each individual part of the
9 basin -- the Chino Basin, the Santa Ana, the main stream
10 of the Santa Ana, and so forth -- that planning and that
11 organization was in effect.

12 You also had the regional board making studies,
13 particularly with the dairies. I mean, that's a
14 difficult political problem.

15 SPECIAL REFEREE: What was the position of the
16 producers who ended up negotiating the settlement that
17 became the judgment on water quality issues and who
18 would be addressing --

19 MR. LITTLEWORTH: I think only that it needed to
20 be addressed but in very general kinds of terms. There
21 was not the kind of specific discussion that you're
22 looking for now.

23 SPECIAL REFEREE: Is that still the position of
24 producers in the basin?

25 MR. LITTLEWORTH: I would think not. I represent

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1 Western Municipal Water District which overlies the
2 lower third of the basin, which has a very strong
3 interest in water quality, and two producers which have
4 equally strong concerns about water quality. I think
5 we've all learned a lot.

6 SPECIAL REFEREE: I was confused by the briefs
7 that were filed from those in support of the motion
8 because they indicated that the Regional Water Quality
9 Control Board is the entity to deal with many of these
10 water quality problems -- not the watermaster, not the
11 advisory committee. Is that the position of the
12 supporting parties?

13 MR. LITTLEWORTH: I don't think so. The regional
14 board has a role. It controls discharges, and so it can
15 do a lot in terms of that. But if you're talking about
16 cleaning up existing agricultural pollution, dairy
17 pollution, which maybe goes back 50 years, you've got a
18 different kind of a situation. You maybe could -- you
19 could shut down the dairies and say, okay, move them
20 out, no more pollution today. But you can't take care
21 of the past.

22 SPECIAL REFEREE: I'll go to Mr. Kidman now.

23 But is it the position of the producers that
24 there isn't a way to address water quality issues that
25 the watermaster and advisory committee can incorporate

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1 in their program?

2 MR. LITTLEWORTH: No. No. I didn't say that.
3 Don't mean to imply that. I think that the judgment
4 calls for a management plan, and a management plan
5 clearly should include water quality. What I'm trying
6 to suggest is that the elements of that plan, to really
7 accomplish it, are going to require a lot more than
8 what's in the judgment. It's going to require agreement
9 of people. You have to get to issues of financing. You
10 have to get to issues of whether it's better maybe to
11 pump in certain parts of the basin than others.

12 SPECIAL REFEREE: But that's still going to how
13 you would define the word "program" in optimum basin
14 management program.

15 Mr. Kidman. You've been patient.

16 MR. KIDMAN: Thank you. I'd have to say, first
17 of all, that the characterization of the San Gabriel
18 basin as an example of a highly successful basin
19 management program that is managed by the producers
20 themselves is certainly, in the least, subject to some
21 debate.

22 SPECIAL REFEREE: Is it true that the San Gabriel
23 judgment was modified to more fully address water
24 quality issues?

25 MR. KIDMAN: Yes. That is true. Although it was

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1 a pretty minor modification.

2 SPECIAL REFEREE: Dissension about minor?
3 Nonetheless, go ahead.

4 MR. KIDMAN: In the San Gabriel example, the most
5 stress that they have faced has dealt with water quality
6 issues, and there it was determined that there was a
7 need to have another special district created really to
8 try to specifically deal with their contamination issues
9 because the watermaster didn't have the necessary
10 authorities to carry that out.

11 SPECIAL REFEREE: And was that because the
12 judgment didn't give the watermaster adequate authority
13 or because the watermaster, as a group of producers,
14 refused to deal with water quality issues?

15 MR. KIDMAN: Well, from my point of view, I'd
16 have to say it was both.

17 Now, the issues here are quite a bit different
18 from the issues there. The contamination that they
19 experience is not really a wipe-out for different
20 producers or different large areas of the basin. Yes,
21 there are large plumes of contamination. And the big
22 issue that came up for them was how to prevent the
23 migration of that contamination and issues about whether
24 or not the water producers were actually responsible for
25 migrating -- causing that to migrate. They -- I think

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1 the producers there did support establishment of the
2 special district that I mentioned. But as soon as the
3 heat was off, they went -- they're currently going about
4 the process of dismantling that organization as rapidly
5 as possible.

6 SPECIAL REFEREE: Which organization?

7 MR. KIDMAN: The special district that was
8 established for that water quality.

9 The San Gabriel basin is a success in the same
10 way that this basin is a success. There's been a large
11 amount of water been able to be produced that's of high
12 quality and very cheap for those that have access to it.
13 In this basin, though, it's different because there's
14 two classes of producers, even within the appropriate
15 pool, those that have access to high quality, cheap
16 water and those that have access to poor quality water
17 that is expensive either to replace or treat or to deal
18 with in any fair sense. They're not able to compete on
19 a level playing field with the producers that do have
20 access to the cheap, high quality water.

21 As to the origins of the basin or the way the
22 management program was set up here, Mr. Markman said the
23 Chino Basin Municipal Water District carved out for
24 itself the role as watermaster. We have in
25 declarations -- and I'll represent as an officer of the

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1 Court that the -- Mr. Owen takes the position that Chino
2 Basin Municipal Water District was invited out of the
3 room during most of the negotiations so that they were
4 not in a position of carving out for themselves the
5 position of watermaster. He also --

6 MR. MARKMAN: I don't mean to interrupt, but
7 Don Stark never left the room, and he was their lawyer.

8 MR. LITTLEWORTH: That's right.

9 MR. MARKMAN: He never left the room. In fact,
10 did 80 percent of the talking, if you knew Don.

11 MR. KIDMAN: I don't recall interrupting you.

12 MR. MARKMAN: I'm sorry.

13 MR. KIDMAN: In addition, the matters that are
14 set forth in the declarations of Mr. Owen would indicate
15 that what we had and the confusion that we all have in
16 trying to point to an answer to the issues in the
17 judgment -- the issues that you posed in the judgment is
18 that the judgment was the result of political
19 compromise. There isn't a clear answer one way or the
20 other about whether there needs to be checks and
21 balances. There isn't a clear answer as to where the
22 proper division of authority between the watermaster on
23 the one hand and the producers' representative through
24 the advisory committee on the other. The answers are
25 not clear.

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1 But what has happened in our belief is that over
2 the years the ambiguity has been taken advantage of and
3 that there's been -- that's really a result of two
4 things. And in all due respect to Mr. Cihigoyenetché
5 and his client, one of them was the abdication --
6 literal, practical abdication of any management
7 responsibility in this basin by Chino Basin Municipal
8 Water District as watermaster.

9 SPECIAL REFEREE: I'm curious -- one of my
10 questions is what activities has the watermaster
11 undertaken all these years that has not been in
12 agreement with the advisory committee? Has there been
13 any practical difference in opinion?

14 MR. KIDMAN: To the best of my knowledge, the
15 answer to that would have to be no, because at least
16 until very recently they let the advisory committee run
17 the show, let the advisory committee take over. They
18 let things get to a point where Mr. Markman can say in
19 all honesty -- and he's correct in this, I mean, as a
20 practical matter -- that there's a pervasive policy
21 control by the advisory committee over the watermaster.
22 Well, as it has evolved, that's true, but it's not in
23 the judgment. You can't even see one place in the
24 judgment where it says that the advisory committee has
25 policy control. The one place that it did get into

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1 writing was in Judge Turner's opinion that he wrote
2 almost ten years ago as a result of the identical
3 dispute to what's going on now.

4 SPECIAL REFEREE: Would you view the phrase
5 "recommend and advise" and the phrases such as that in
6 the judgment as being something different than
7 recommending action on the basis of policy?

8 MR. KIDMAN: I rely on Mr. Owen in this regard.
9 It was meant to be advisory. It wasn't meant to be
10 compulsory. Wasn't meant to be policy dictating. It
11 was meant to be advisory, just as the name implies. We
12 have somehow gone so far in our double-think on this
13 that we're able to say that policy -- that advisory
14 means policy.

15 SPECIAL REFEREE: In the judgment it allows the
16 advisory committee by 80 votes to mandate certain
17 actions of the watermaster.

18 MR. KIDMAN: Right.

19 SPECIAL REFEREE: What actions of the watermaster
20 wouldn't fall within that potential mandate?

21 MR. KIDMAN: I think that the question needs to
22 be asked the other way around. What does fall --

23 SPECIAL REFEREE: But can you answer it the way I
24 asked it?

25 MR. KIDMAN: No. 'Cause I think that the ones

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1 who don't --

2 SPECIAL REFEREE: Can you answer it, Mr. Markman?

3 MR. MARKMAN: Sure, I can answer it. Any
4 discretionary determination requires -- I mean, there's
5 one sentence in here that answers all your questions.
6 Subparagraph 38(b) of the judgment couldn't be clearer.
7 "The advisory committee shall have the duty to study and
8 the power" -- that's the word -- "power to recommend,
9 review, and act upon all discretionary determinations
10 made or to be made hereunder by watermaster."

11 And then there follows the two paths of
12 procedure, one of which is the 80 votes means you have
13 to run to the Court to disagree. Less than that you
14 have to hold a hearing, make findings to disagree, and
15 then that can be taken to the Court.

16 So I don't know what could be clearer. And
17 that's what brings you to your distinction between
18 discretionary and other kinds of acts of the
19 watermaster.

20 MR. KIDMAN: Now I really need to try to answer
21 the question that you asked before --

22 SPECIAL REFEREE: I'd like you to.

23 MR. KIDMAN: -- you referred it over. The --
24 what actions are discretionary? That's the question.

25 SPECIAL REFEREE: No. I think my question was --

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1 MR. KIDMAN: And I think the only answers that --
 2 the only issues that are discretionary are those that
 3 involve basin management plan and funding. All of the
 4 other things, like the business of getting an audit paid
 5 for, for goodness' sake, are not a discretionary act,
 6 not something that the producers should be able to
 7 mandate, as they recently tried to do.

8 The issues are basin management plan and funding.
 9 And in those areas -- and admittedly they're very broad
 10 areas -- yes, I admit the advisory committee does have
 11 policy-making authority. But otherwise, in all of the
 12 day-to-day activities of the watermaster with respect to
 13 going out and doing the accounting of who's pumping what
 14 and who should be paying what and, you know, managing
 15 the funds and making sure the bills are paid and doing
 16 all of those things, those are not discretionary, and
 17 they do not -- they are not subject to the 80 percent
 18 mandate of the advisory committee.

19 SPECIAL REFEREE: I've been concerned that
 20 perhaps the word "discretionary" was not used with great
 21 care in drafting the judgment and that the distinctions
 22 drawn on what is discretionary are much more difficult
 23 to answer than to just say 38(b) answers the question.

24 Let me ask a couple questions. If you look, for
 25 example, at the provision on rules and regulations, the

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1 advisory committee has to recommend rules and
 2 regulations, the way I read it, for the watermaster to
 3 act. Is that correct?

4 MR. MARKMAN: Yes.

5 SPECIAL REFEREE: Is the adoption of rules and
 6 regulations by the watermaster a discretionary action?

7 MR. MARKMAN: Oh, I think it certainly should be
 8 considered that. For example -- just give you one small
 9 example.

10 SPECIAL REFEREE: Wait. Let me make clear. You
 11 would say that it is a discretionary act of the
 12 watermaster to adopt rules and regulations that have to
 13 be first recommended by the advisory committee?

14 MR. MARKMAN: Oh, absolutely. Because things
 15 come into play such as how much notice you're going to
 16 give, how much time after you make a decision under
 17 rules and regulations someone might appeal to the Court.
 18 Any number of -- any number of procedural issues that
 19 become very important to people are incorporated in
 20 rules and regulations.

21 And to me, it's not hard. I mean, Art can argue
 22 all he wants, but the word "discretionary" has a meaning
 23 both in the dictionary and by analogy to legal cases we
 24 cited and ministerial acts. The difference between
 25 those kinds of acts are decided every day in mandate

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1 actions. If you are compelled to do something or just a
 2 ministerial function part of your duties, like being
 3 sure you account correctly, produce reports correctly,
 4 be sure people have measuring devices -- things where
 5 you don't have decision-make- -- you're not using
 6 discretion like you would if you decided whether to
 7 conduct a special audit, which is what is before the
 8 Court now, or which law firm or engineering firm you
 9 might hire to accomplish something important.

10 And, remember, the producers pay for all of this.
 11 That's a distinction that shouldn't be lost. So when
 12 somebody discretionarily spends the producers' money, I
 13 don't find it surprising that the producers ought to be
 14 calling the shots on that.

15 And so the word "discretionary" is in there in
 16 the broadest sense. Discretionary, all discretionary
 17 determinations. It doesn't refer back to "as described
 18 in subparagraphs a, b, c, d, e of this judgment."
 19 Doesn't say that. It's not restrictive. Art is arguing
 20 for that.

21 SPECIAL REFEREE: Would you draw a line to define
 22 discretionary versus otherwise by where the watermaster
 23 acts at the advisory committee's recommendation?

24 MR. MARKMAN: No. I think that if the advisory
 25 committee is in the process, you can believe it's

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1 already a discretionary act and the watermaster may
 2 disagree, move the matter up to the Court, depending on
 3 which of those two processes applies.

4 SPECIAL REFEREE: In the example I give, the
 5 rules and regulations, can the watermaster disagree with
 6 the recommendations of the advisory committee?

7 MR. MARKMAN: Oh, I think so. Absolutely. Take
 8 it to the Court.

9 SPECIAL REFEREE: Has that happened?

10 MR. MARKMAN: Pardon me?

11 SPECIAL REFEREE: Has that happened?

12 MR. MARKMAN: Only over these -- the only time
 13 this has happened where it all came to a head is over
 14 this process we're in right now, that I'm familiar with.
 15 Others may be familiar with prior processes.

16 MR. GRINDSTAFF: Can I interrupt and bring in an
 17 example? You asked if there had been a conflict between
 18 watermaster and the advisory committee. The entire
 19 reason we're sitting here today is because during the
 20 process of getting water for the desalter, which Art
 21 alluded to, one of the members of the watermaster board
 22 came to a meeting of the ag pool and said, If we can't
 23 get water for this desalter, then I want to work with
 24 you in the ag pool, and we're going to have enough votes
 25 so it won't be a mandated action, and we will mandate

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1 that there will be water provided for that desalter.
 2 That was the major issue, in fact, when the first motion
 3 was made to replace watermaster was that someone from
 4 watermaster had the nerve to actually come into the
 5 basin and say we're going to take an action or we're
 6 going to work with somebody to take an action that might
 7 be opposed by a majority of the advisory committee. And
 8 that's why. And everybody forgets that. But that is in
 9 fact the specific reason that motion initially was made
 10 and the major issue that underlies what we're talking
 11 about. The watermaster actually at one point said, We
 12 want to take an action to see that this basin begins on
 13 the cleanup path, and that action was --

14 MR. MARKMAN: And said he was going to take the
 15 political path --

16 SPECIAL REFEREE: Art? Can you expand on that
 17 for me?

18 Mr. Kidman.

19 MR. GRINDSTAFF: Go ahead.

20 MR. KIDMAN: The problem was that there needed to
 21 be a program to start providing for lowering TDS in the
 22 lower end of the basin, and that's where the desalter
 23 plan came into play. It was pushed by SAWPA, by Neal
 24 Klein. It was pushed by a number of producers. It was
 25 pushed by some of the dairy interests because they

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1 needed a way to get an offset from rules that were being
 2 imposed upon them by the regional board. And as I
 3 indicated, outside funding sources -- from the State of
 4 California, from the federal government -- were brought
 5 into play. Came down to the only thing that wasn't
 6 really covered -- capital costs were covered. Came down
 7 to a question of who is going to pay for the water that
 8 is extracted from the basin in order to put it through
 9 the desalter and begin the process of some cleanup. And
 10 that issue --

11 SPECIAL REFEREE: So the watermaster wanted to
 12 take an action --

13 MR. KIDMAN: There was a proposal by one member
 14 of the watermaster board at that time, Chino Basin
 15 Municipal Water District, that said that they would
 16 support moving forward with that, allowing that
 17 production to take place without assessment under the
 18 watermaster. It was that attempt at independence that
 19 brought this whole house of cards down around all of us.

20 SPECIAL REFEREE: Reply?

21 MR. MARKMAN: Well, the reply is -- I agree that
 22 frames the issue perfectly. We have a judgment, agreed,
 23 could not have even been in place. We wouldn't be
 24 having this discussion without all these appropriators
 25 who, as Art said, have the good fortune of being in the

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1 position of producing water at a very fine price to its
 2 rate payers and good quality water.

3 And exactly what somebody -- Don Stark -- said
 4 would happen 20 years later has happened. Now the ag
 5 people have different ideas of what they want to do.
 6 They've got enough poor quality down there, after
 7 20 years of using the water for that purpose, that they
 8 need relief. And when they go looking for relief, they
 9 go look for people to spread the costs. And the people
 10 to spread the costs are the appropriators. So the two
 11 ran head-on into each other.

12 And the Court's watermaster -- that's supposedly
 13 an arm of the Court -- gets directly involved on one
 14 side of the issue and gets aggressive and gets involved
 15 in a physical operation of the basin, not acting as
 16 watermaster. And to no one's surprise, the confidence
 17 that the majority of the producers had in that
 18 watermaster diminished rapidly, as it should have.

19 So I pretty much agree with how it went down. I
 20 don't characterize it the same way Mr. Kidman does.

21 I want to say one other thing. This points
 22 out -- Art Kidman and I worked very hard together for
 23 about five to seven years to create a watermaster that
 24 was a public entity up in the Mojave, which we recently
 25 succeeded in doing, that had nothing but ministerial

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1 functions to the absolute maximum amount we could create
 2 that so that we wouldn't run into the kind of
 3 discussions we're having here today about how a
 4 watermaster got involved in other activities that
 5 impacted what it cost the producers in the basin.

6 So we are living through just what he and I tried
 7 to avoid up there. In fact, Art Kidman was the premier
 8 spokesman for having producers rather than a public
 9 entity manage a basin as watermaster because of the fear
 10 of how Mojave Water Agency would act. So I guess it
 11 just depends on where you are or who --

12 SPECIAL REFEREE: Let me interrupt you. I think
 13 the focus here is to figure out what this judgment says
 14 and what the structure that was intended is. And I was
 15 trying to get some resolution on some of the issues I've
 16 had reading this that go to the question of what is
 17 discretionary and what isn't. I'm confused still, so
 18 I'm going to go back to those questions.

19 One of the principles here seems to be that if an
 20 act is discretionary -- take you back to 38(b). If an
 21 act is discretionary, then the advisory committee with
 22 80 votes can mandate that some different act be taken.
 23 If it's not discretionary, then that 80-vote mandate
 24 doesn't apply. Is that correct? Does everyone agree
 25 with that?

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1 MR. MARKMAN: Yes.

2 MR. KIDMAN: Yes. That's correct.

3 SPECIAL REFEREE: Then I'm reading the judgment,
4 and I look and find that in some places there is a very
5 clear statement that there has to be a recommendation of
6 the advisory committee for the watermaster to proceed.
7 And examples of that -- flip through and find the
8 numbers. Examples of that are the rules and regulations
9 adopting the budget, studies -- I'm forgetting one, I
10 think -- but other provisions do not say that the
11 watermaster has to act at the recommendation of the
12 advisory committee. Is there a distinction intended
13 between those that specifically require action upon
14 recommendation and those that do not? For example --
15 I've lost it again. For example, paragraph 20,
16 employment of experts and agents, doesn't have that
17 recommendation of the advisory committee language.

18 So my question, as an example question, is: If
19 the watermaster under Section 20 engages legal or
20 accounting help, is that in any way subject to the
21 oversight or veto or mandate of the advisory committee?
22 And why? What would be the authority for that?

23 MR. MARKMAN: Well, first of all, we clearly
24 think it does, and let me give you an example. If you
25 look at paragraph 20, it says, Watermaster may employ or

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1 retain, obviously having discretion to take RFPs and
2 decide who the experts ought to be.

3 SPECIAL REFEREE: Let's be careful with the word
4 "discretion."

5 MR. MARKMAN: And then if you look at 21,
6 Measuring devices: Watermaster shall cause parties to
7 have the measuring devices.

8 Again, let me go back to the theme here.
9 Number one in paragraph 38 doesn't say "as enumerated in
10 the paragraphs that specifically mention it."

11 I realize there may be an argument there, but the
12 bottom line of this is the producers are paying for all
13 of this. Not Chino Basin Municipal Water District
14 through its property tax or other funds. And if there's
15 a different watermaster board, obviously the only funds
16 it will have available are going to come from the
17 producers.

18 SPECIAL REFEREE: So your answer to that would
19 be, apparently, that it isn't discretionary because this
20 paragraph 20 action could only be done pursuant to a
21 budget approval that was already at the recommendation
22 of the advisory committee?

23 MR. MARKMAN: Well, no. Let me make the
24 distinction. I think it is discretionary because while
25 you may allocate in the budget \$50,000 or a hundred

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1 thousand dollars a year for legal counsel, I think it
2 can become quite important to the advisory committee
3 which legal counsel served as watermaster counsel and
4 that, number one, the quality of legal counsel be
5 something that they have input on.

6 SPECIAL REFEREE: I'm not sure that either I'm
7 asking the question clearly or it's being answered. The
8 question is, Is there some distinction in the judgment
9 based on when recommendation of the advisory committee
10 or assent of the advisory committee is required and when
11 it's not as to whether you characterize the action of
12 the watermaster as discretionary or not?

13 MR. MARKMAN: Let me answer that --

14 MR. KIDMAN: Our position is that those
15 provisions which specifically call for advisory
16 committee input are those that are meant to be
17 discretionary and those which do not or which are silent
18 on it are those which are meant to be not discretionary
19 and that that -- that I agree certainly that the use of
20 the term "discretionary" in this judgment did create a
21 great ambiguity for those of us that are used to dealing
22 with distinctions between discretionary and ministerial
23 that don't track the way that these paragraphs under
24 powers and duties are set up.

25 That was the result, I am told -- and I represent

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1 to you, again, as an officer of the Court -- political
2 compromise. I'm told that they went down the list, and
3 they went around the room, said, Should advisory
4 committee be involved or not in this type of decision or
5 that type of decision? And it wasn't done on the basis
6 of nice, neat distinctions that perhaps, as lawyers, we
7 try to create. It was done on the basis of what they
8 thought would make sense at the time that they were
9 looking at it and what the political determination was.

10 So the best that we can come to is what the list
11 says has advisory committee input and what doesn't. And
12 those that do have advisory committee input probably
13 would have to be categorized as discretionary, and those
14 that don't are not.

15 SPECIAL REFEREE: Well, it seems to be important
16 to be able to draw a distinction, if it's possible,
17 because the way I read this, 38(b) and the 80-vote
18 mandate applies if they are discretionary and not if
19 they are not.

20 MR. MARKMAN: Well, I would like to --

21 SPECIAL REFEREE: But I don't know if that's a
22 moot point, and I'd like your input on that. Is that a
23 moot point? Because, in effect, there's budget control
24 and rules and regulations control and the advisory
25 committee anyway.

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1 MR. MARKMAN: I'd like to give input. First of
2 all, the plain language of the judgment in paragraph
3 38(b) does not, and it could easily have cross-
4 referenced those particular items which are earmarked
5 for advisory committee input. So although Mr. Kidman
6 would like you to believe there's a bright line there,
7 there isn't a bright line there.

8 SPECIAL REFEREE: It talks about all
9 discretionary determinations made or to be made
10 hereunder by watermaster. Are you interpreting
11 "hereunder" as extremely limited, or are you
12 interpreting "hereunder" as applying to the whole
13 judgment?

14 MR. MARKMAN: I think the "hereunder" applies to
15 the whole judgment and that the discretionary decisions
16 are by far the majority of what could happen and the
17 reason for this. And, by the way, I was in those
18 negotiations, and I wasn't there every day, but I worked
19 on that very hard for three years with my partner, and I
20 don't recall any discussion. Let's go down this thing
21 paragraph by paragraph, and we'll stick in advisory
22 committee input where we think it's discretionary or
23 there ought to be input and we'll leave it out where
24 there ought not to be. It doesn't say that. Those
25 different paragraphs don't say, This is discretionary.

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1 This isn't.

2 There was emphasis on some things that were
3 extremely important that advisory committee input would
4 have to be put on, but where is the intent in here for
5 that to be -- for those called-out items to be
6 exclusive? I don't think it's --

7 SPECIAL REFEREE: So is it your conclusion --

8 MR. KIDMAN: Let me answer that "where is the
9 intent" here that there should be no distinction between
10 the watermaster and the advisory committee.

11 Mr. Markman's position is that every decision made by
12 the watermaster is subject to the mandatory direction of
13 the advisory committee.

14 SPECIAL REFEREE: Let me clarify.

15 MR. KIDMAN: Therefore, there's no reason to have
16 a distinction.

17 SPECIAL REFEREE: Except for perhaps ministerial
18 metering and accounting purposes. Is that your
19 position? That there are no actions of the watermaster
20 that are discretionary for purposes of 38(b) and the
21 ability of the advisory committee?

22 MR. MARKMAN: Well, that's one way to try to
23 minimize --

24 SPECIAL REFEREE: That's my question.

25 MR. MARKMAN: No. My answer to that is that the

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1 vast majority of what the watermaster through its staff
2 does, day in and day out, is ministerial, and that's
3 what the district carved out itself. It is the
4 operating entity doing the accounting, having the
5 personnel, and taking care of the paperwork and other
6 matters related to the judgment that do not require the
7 exercise of discretion.

8 SPECIAL REFEREE: So is your answer to my
9 question yes, then?

10 MR. MARKMAN: No. Because there's another role
11 carved out for the watermaster here, and that's the role
12 of looking at or disagreeing with the input of the
13 advisory committee and taking it on up to the Court if
14 it believes a minority needs protection on a certain
15 advisory committee decision or recommendation. So
16 that's the second point.

17 SPECIAL REFEREE: Do you have a history, other
18 than the desalter example, where the watermaster has
19 taken a minority position in order to take it to the
20 Court?

21 MR. MARKMAN: Oh, I have recent ones. One is
22 this motion and the audit and the question of whether
23 Mr. Fudacz could continue.

24 SPECIAL REFEREE: Are they all recent motions?

25 MR. MARKMAN: Yes. And then there was another

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1 set of them. Mr. Cihigoyenette brought a motion to
2 review a number of advisory committee decisions related
3 to personnel. That has come up since your appointment
4 as referee. So those are the only ones I know of.

5 MR. CIHIGOYENETTE: Which brings about an
6 interesting point that I would like to comment that
7 Mr. Markman brought to your attention. Is that where
8 the minority does disagree with the 80 percent mandated
9 ruling of the advisory committee, that can be challenged
10 in court, and it's all funded by the producers.

11 Well, my experience is that couldn't be further
12 from the truth. This motion is the perfect example. I
13 personally have a bill sitting on my desk right now that
14 was generated in challenging the appointment of the
15 nine-member board in representing Chino Basin, for all
16 practical intents and purposes, as the watermaster, and
17 the fees incurred in representing the minority's view in
18 that regard were summarily rejected for payment by the
19 advisory committee and sent back to Chino Basin.

20 So if anyone is going to vindicate the minority's
21 rights under this adjudication, they should rest assured
22 that they're going to bear the expense of doing so, for
23 one.

24 SPECIAL REFEREE: Now, do you think that's a
25 proper interpretation of the judgment?

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1 MR. CIHIGOYENETCHE: No, I don't. No, I don't.

2 MR. MARKMAN: This was the unfortunate -- I feel
3 for Jean and for Fred -- the advisory committee is
4 taking a position on who ought to be the watermaster and
5 paying Mr. Fudacz who's supposed to be -- up until
6 April 29 was -- the watermaster's lawyer. While trying
7 to change watermaster, he had this vision of the office
8 of watermaster and Mr. Cihigoyenetché, representing the
9 district which was then watermaster, opposing the motion
10 and both of them submitting bills to the advisory
11 committee as attorney for the watermaster.

12 SPECIAL REFEREE: Well, perhaps that's an
13 extraordinary situation.

14 MR. MARKMAN: I thought it was real --

15 SPECIAL REFEREE: In an ordinary situation, is
16 the function of this judgment, provision 38(c), that the
17 interest of a minority can be taken up by the
18 watermaster? And is that an important function of the
19 watermaster? And -- that's an important question
20 because of course it goes to what -- whether that
21 function would be appropriately carried out by a
22 nine-member board, for example.

23 MR. KIDMAN: You know, my reaction generally is
24 this. We can generate a lot of heat and not very much
25 light on answering -- trying to answer the question of

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1 of the basin getting low-cost water. And under this
2 judgment the more they produce in that sweet part of the
3 basin, the more voting power they can get under the
4 judgment. And those --

5 SPECIAL REFEREE: The examples of these motions
6 you've mentioned, those are recent, as I understand
7 it --

8 MR. KIDMAN: The --

9 SPECIAL REFEREE: -- so when you talk about the
10 tyranny of the majority, is that the situation as you
11 perceive it going back to the judgment? Has there been
12 a tyranny of the majority all these years up until
13 recently so that the watermaster has been unable to
14 function?

15 MR. KIDMAN: I can't speak to that other than to
16 say it seemed reasonably evident in Judge Turner's --
17 and that was halfway back when he -- in his opinion, he
18 felt that improper procedure was followed by the
19 minority that made the motions at that time and that
20 they failed to bring up what they thought should be the
21 appropriate plan to be implemented. It hadn't been --
22 in a sense hadn't exhausted their administrative
23 remedies before they went to court.

24 That's how Judge Turner decided that opinion.
25 But he said, Look, now that they did ring the bell,

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1 discretionary versus nondiscretionary, but the real
2 central issue that underlies what's going on here today,
3 even from the discussion you've already had about the
4 desalters and the history of that, the underlying issue
5 is clearly discretionary. The question of adopting a
6 basin management plan is clearly discretionary. There
7 is no -- we have no dispute that it is. The question of
8 coming up with a plan, a physical facilities to address
9 that issue is clearly discretionary. The question of
10 coming up with the money and how to allocate the money
11 is clearly discretionary.

12 So on all the issues that really matter here,
13 cost allocation and cleaning up this basin, this debate
14 is really not very helpful. The question is, Can the
15 tyranny of the majority govern under this judgment, or
16 is it necessary that under those areas that are clearly
17 discretionary -- is it necessary to have some
18 independent check and balance against? And I'm sorry
19 for the inflammatory "tyranny" --

20 MR. MARKMAN: Tyranny is good.

21 MR. KIDMAN: -- but the rule of the majority we
22 all know in some instances can become a terror for the
23 minority. And in this instance there are clear
24 pecuniary interests of some producers to continue to
25 produce, as they have historically, from the sweet part

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1 there truly are very, very important water-quality
2 issues that need to be addressed, and he wanted to see
3 that they were addressed.

4 So just going back that almost ten years to that
5 bar, I would have to say that there's an example of
6 where the majority has been exercising its tyranny over
7 minority.

8 MR. MARKMAN: My response to that is there has
9 been set forth in this judgment something very easy to
10 understand. There's a protection for the minority
11 because the watermaster, if it concurs with the minority
12 position, can take the matter to court one of two ways.
13 The parties who disagree can always take a matter to the
14 Court subsequent to the watermaster's action. So where
15 is this tyranny? Is it surprising that the people who
16 pay the bills and the people who got together and
17 negotiated this adjudication want to be sure there's no
18 tyranny of the minority with respect to charging the
19 costs of their pollution problem up to the north so that
20 the people who are in this adjudication producing from
21 the sweet spot and now pay so others can produce from
22 the new sweet spot, which is what the issue is over the
23 water going through the desalter. And I don't want to
24 say that provocatively because I think this needs to be
25 solved and negotiated --

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1 SPECIAL REFEREE: Let's go back to your statement
 2 that the watermaster is an arm of the Court.
 3 MR. MARKMAN: Yes.
 4 SPECIAL REFEREE: Are you saying that because it
 5 serves that function, if it agrees with the minority
 6 position, to at least take it to the Court to resolve it
 7 in the face of advisory committee --
 8 MR. MARKMAN: Yes.
 9 SPECIAL REFEREE: -- disagreement?
 10 MR. MARKMAN: I believe that's so. I think that
 11 the watermaster, when it performs that role, is like the
 12 public advocate more so than the staff at the Public
 13 Utilities Commission when it independently takes a look
 14 at what's coming at it when an applicant puts something
 15 through the PUC, something like that.
 16 I think that there is -- there is that function
 17 to perform, and that's why we think the watermaster --
 18 the way the judgment is set up now, the watermaster
 19 needs to represent a diversity of interests. We're not
 20 even asking for producer-controlled watermaster or
 21 certainly not an appropriator-controlled watermaster.
 22 SPECIAL REFEREE: Mr. Kidman?
 23 MR. KIDMAN: The point that I need to rise to
 24 debate on -- Mr. Markman has brought it up twice -- is
 25 that the implication is that the producers in the south

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1 end of the basin have somehow fouled their own nest and
 2 therefore they have the responsibility of cleaning it
 3 up. Nitrates -- it's a very ubiquitous situation. We
 4 get nitrogen as a byproduct from all organic activity on
 5 the face of the earth. Sure, there are dairies that are
 6 located in the south in the basin. Some of them are
 7 producers of water, and you can point to those few and
 8 say, gee, you know, maybe they have really contributed
 9 disproportionately to the water quality issue. I don't
 10 have a brief one way or the other on that. But you can
 11 look at literally every basin in Southern California and
 12 look to the lower end, to the sump end, of the basin,
 13 and you will find water quality problems in all of them,
 14 though not all of them have dairies and not all of them
 15 have the ability to point their finger or find a
 16 scapegoat for that.
 17 What we have here is a problem -- the water
 18 quality problem that has been created in large part by a
 19 hundred and fifty years of civilization that's occurred
 20 over the -- overlying this basin, and somehow we need to
 21 find a way for the community to clean it up, to start
 22 dealing with it.

23 SPECIAL REFEREE: The question I'm concerned with
 24 is whether there is a role of a watermaster to bring
 25 what may be a minority position on a water quality issue

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1 to the Court against the wishes of an advisory committee
 2 in order to allow the Court to carry out the physical
 3 solution as intended.
 4 MR. KIDMAN: I think that the answer to that
 5 question, the way it's phrased, is yes. Mr. Markman
 6 agrees. He also indicates, since there needs to be that
 7 role, that there's got to be some separation between the
 8 two functions.
 9 SPECIAL REFEREE: And so that role --
 10 MR. KIDMAN: I would go further --
 11 SPECIAL REFEREE: Let me interrupt you. So that
 12 role is a role of being a vehicle to take a minority
 13 position to the Court to decide against advisory
 14 committee view. Is it also a role of the steward of a
 15 basin resource including water quality? Is that a
 16 proper role of this watermaster intended in the
 17 judgment?
 18 MR. KIDMAN: Yes. There are two different roles
 19 that you're talking about there, and let's remember that
 20 there's a difference between a 50 percent vote and an
 21 80 percent vote. Because in a 50 percent vote the
 22 watermaster could itself decide to go in a different
 23 direction than the advisory committee, and then it would
 24 be up to the advisory committee or up to the majority
 25 producers to go to court with it.

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1 On the other hand, it would seem, yes, that if
 2 it's an 80 percent vote and there's some, quote, tyranny
 3 that's gone on that, in that circumstance, either the
 4 watermaster or the minority that is hurt by it should be
 5 able to go to court.

6 But over and above either of those two
 7 circumstances is the public interest. Under Article 2,
 8 Section 10 -- Article 10, Section 2 of the constitution
 9 was to make sure that we don't have a waste and a
 10 reasonable use -- or unreasonable method of use.

11 SPECIAL REFEREE: And is that the role of the
 12 watermaster?

13 MR. KIDMAN: In my opinion, yes. I think the
 14 watermaster makes the first determination of that,
 15 subject to advice coming from the advisory committee,
 16 and it's subject to review by the Court.

17 MR. LITTLEWORTH: Moving on --

18 MR. MARKMAN: If I may add something on this
 19 subject. You asked --

20 SPECIAL REFEREE: Excuse me. Mr. Littleworth was
 21 starting. I'll come back to you.

22 MR. LITTLEWORTH: One of your first questions
 23 that you asked when you were laying out the issues was
 24 whether a nine-person board as proposed basically would
 25 act responsibly or could be expected to act responsibly

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1 and to perform well, whatever the functions of a
2 watermaster are. And we haven't really touched on that
3 issue.

4 And I suppose one can say, as I think some of the
5 briefs have, well, it's a one-man, one-vote situation,
6 and so the producers have got six votes and the public
7 agencies have three votes, and so they can be outvoted,
8 and so that's it.

9 I think the inclusion of Western Municipal and
10 Three Valleys, the two other public agencies in addition
11 to the Chino Basin district, all public agencies, all
12 with responsibilities and all with histories -- Western
13 has a strong history of dealing with water quality
14 matters -- that the inclusion of those three public
15 entities on the watermaster vastly improve the
16 watermaster from the way it is now. If you leave it the
17 way it is now, it's pretty clear we're not getting
18 anything done. If you put the State of California in
19 there on an interim basis, I don't think we're going to
20 get very much done either. You maybe get the
21 ministerial functions done, but the State is not going
22 to be getting in the middle of trying to negotiate and
23 adjudicate all kinds of problems that one's got to
24 handle to really make a plan work.

25 I think the plan which is proposed, bringing the

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1 two other major public agencies into the picture along
2 with Chino, offer all kinds of protections for minority
3 views, if there are. Also assuming responsible
4 positions to clean up pollution however best that can be
5 done and trying to work out the financing that's going
6 to be required for that kind of thing, I think we
7 shouldn't underestimate the value of bringing the two
8 other districts onto the watermaster board along with
9 Chino.

10 Now, if the producers are out of line and doing
11 something that is clearly selfish, not in the interests
12 of the basin as a whole, you've got public agencies on
13 the watermaster in the best position in the world to go
14 to court. Going to court is where the final approval
15 is. That's the final protection. You really need
16 somebody that can go to court, and the public agencies
17 are best suited to do that if in fact they feel that the
18 producers are not performing responsibly.

19 I don't think you can say that at this point. A
20 lot of arguments about, you know --

21 SPECIAL REFEREE: Are you talking about the
22 public agencies that would be part of the nine-member
23 board?

24 MR. LITTLEWORTH: Yes. Yes. They're adding
25 three -- I mean, the proposal is to have six producers,

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1 representatives of producers, and three public agencies.
2 There is now one public agency, the only one, Chino
3 Basin District. The proposal would add to the
4 watermaster board Western Municipal Water District,
5 which overlies the lower third of the basin and the area
6 where the water quality problems are most acute, and the
7 Three Valleys district, which overlies the western
8 portion of the basin.

9 SPECIAL REFEREE: Is Three Valleys a producer?

10 MR. KENNEDY: No.

11 MR. LITTLEWORTH: No.

12 SPECIAL REFEREE: So Western, Three Valleys, and
13 Chino would be nonproducer, public agencies.

14 MR. LITTLEWORTH: They're all three nonproducers.

15 SPECIAL REFEREE: And the rest of the make-up of
16 the board?

17 MR. LITTLEWORTH: I don't remember exactly. It's
18 two --

19 MR. KENNEDY: There would be --

20 MR. MARKMAN: Would --

21 SPECIAL REFEREE: Wait a second.

22 MR. MARKMAN: Three appropriate pool members
23 and three overlying pool members -- two from the ag pool
24 and one from the non ag overlying pool -- and three
25 public entities, which -- if you want me to get nervous

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1 about the appropriators, if you take the three overlayers
2 and add Western and one more vote, it takes you to the
3 point of the argument that's been made that the
4 appropriators or the advisory committee would control
5 this new watermaster board.

6 I rather think it's kind of weighted the other
7 way, that you have three overlayers, three appropriators,
8 and you have Western Municipal and Chino Basin Municipal
9 which, to no one's surprise, could align themselves with
10 the agricultural interests when you talk about
11 allocating these clean-up costs. And I can account for
12 five votes right off the bat that at least arguably
13 likely could disagree entirely with the advisory
14 committee so that the balance is struck.

15 SPECIAL REFEREE: Well, certainly one of the
16 issues raised is whether there is any likelihood that
17 the nine-member board would disagree with the advisory
18 committee.

19 MR. MARKMAN: And I think it's quite likely if
20 you look at the papers filed in this proceeding and you
21 see where the agricultural interests lie, or where the
22 people representing them lie, and you look at where
23 Chino Basin has been and you look at Western Municipal,
24 which is overlying that area. As I said, I don't know
25 how -- I wasn't here when this constituent board was

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1 discussed in the subcommittees, but I think, if
2 anything, the predilection would be that you can count
3 five votes very likely, or at least somewhat likely, to
4 side with the agricultural interests or the people in
5 that area rather than with the northern appropriators.
6 So the balance is struck.

7 SPECIAL REFEREE: I imagine a great deal of vote
8 counting has occurred. Mr. Kidman.

9 MR. KOOPMAN: Mr. Markman, would you expand that.
10 Three -- you said three overlying. You're including two
11 from overlying non ag. Are you also including one
12 overlying non ag --

13 MR. MARKMAN: One overlying non ag.

14 MR. KOOPMAN: -- in the three?

15 MR. MARKMAN: In the three.

16 MR. KOOPMAN: And would you agree that the
17 overlying non ag has not -- if my perception is correct,
18 never aligned itself with the overlying ag pool?

19 MR. MARKMAN: I don't know about that. I
20 can't even answer --

21 SPECIAL REFEREE: Would you tell the reporter
22 your name?

23 MR. KOOPMAN: Gene Koopman. She has my card.

24 SPECIAL REFEREE: I was going to Mr. Kidman.

25 MR. KIDMAN: And what was the question --

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1 counting the votes? -- to me? The position of my --

2 SPECIAL REFEREE: Let me restate my question. My
3 question goes to whether the view of the parties
4 opposing the motion is that the watermaster, if it were
5 the nine-member board, would not take on the advisory
6 committee.

7 MR. KIDMAN: I keep wanting to answer a different
8 question than the one you asked.

9 SPECIAL REFEREE: Well, why don't you answer
10 mine. Then you can tell me a new one.

11 MR. KIDMAN: I'm going to try to do that. We --
12 our position is that there will be a natural tendency
13 for the producer members of the watermaster committee to
14 follow the directions and the positions of those who
15 appoint them and those who they represent.

16 SPECIAL REFEREE: But you aren't answering that
17 in an absolute way. I mean, it is --

18 MR. KIDMAN: That's right.

19 SPECIAL REFEREE: -- conceivable to you, in other
20 words, that you could have votes go so that the
21 watermaster in the nine-member board configuration would
22 actually disagree with the advisory committee?

23 MR. KIDMAN: Rare individuals exist who would let
24 the public interest overrule the pecuniary interests of
25 their masters.

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1 MR. MARKMAN: And certainly not lawyers.

2 SPECIAL REFEREE: One of the questions has to be
3 is there any gauge that the Court would be able to use
4 to assess whether the watermaster were acting in the way
5 intended in the judgment if that's to be a steward of
6 the resource to carry out the physical solution? Is
7 that possible?

8 MR. KIDMAN: I didn't --

9 SPECIAL REFEREE: Is there some gauge that the
10 Court can have to assess whether the watermaster is
11 serving the function -- the separate function intended
12 in the judgment to be a steward to represent the
13 minority at times in order to get an issue resolved when
14 there's considerable disagreement?

15 MR. KIDMAN: Under the current proposal, I don't
16 think there is.

17 SPECIAL REFEREE: Okay.

18 MR. KIDMAN: I think there's a need to have some
19 mechanism to assure that all points of view are taken
20 into consideration. As we all grew up as students of
21 government in America, we cherish the idea that we have
22 checks and balances in our constitution and that the
23 things -- what I call a Rube Goldberg machine is set up
24 to work by itself without having to have some specific
25 oversight by some independent authority.

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1 The best assurance the Court can have that this
2 system will work right is to make sure that there are
3 appropriate internal tensions so that we don't have a
4 situation where a majority of the advisory committee is
5 really controlled by the same people that control a
6 majority of the watermaster.

7 SPECIAL REFEREE: Some of my questions are
8 whether there are internal tensions created in the
9 judgment anyway.

10 MR. KIDMAN: Our view is history has shown that
11 whatever internal tensions there were originally
12 intended have failed.

13 MR. GUTIERREZ: May I respond to the question?

14 SPECIAL REFEREE: Yes.

15 MR. GUTIERREZ: You asked earlier if there was an
16 example of a watermaster joining the tyranny of the
17 majority, and I want to answer that question in the
18 affirmative by saying that there's been an abdication,
19 both by the advisory committee and the watermaster, with
20 respect to the issue of water quality. And I want to go
21 back to the motion that the City of Chino made almost
22 ten years ago with respect to the issue of water
23 quality.

24 In his order Judge Turner slapped the City of
25 Chino at that time for not going through the procedures,

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1 but he did something that was interesting. He did two
2 things. Number one, he rejected the concept by a
3 significant group of producers that the question of
4 water quality belonged to everyone who was a producer in
5 the basin. It wasn't shared solely by those producers
6 in the south. The second thing he did was he ordered
7 the implementation plan. That's been nearly ten years.
8 We still don't have one.

9 And so I think that the best example of the
10 tyranny of the majority is seen in the fact that the
11 watermaster, as it's been constituted, has not been able
12 to do its function. And its function rises above merely
13 protecting the minority interests or the interests of
14 the minority of some of the producers, but dealing with
15 the bigger interest of maintaining the water quality. I
16 think that you're well aware that the water quality in
17 this basin has degraded terribly over the last 20 years.
18 It was bad 20 years ago. It was worse ten years ago.
19 It's worse now than it's projected to be ten years from
20 now. And no plan in effect.

21 You ask some very good questions. The person who
22 was involved in the study doesn't know where we are, and
23 I think that's significant. And I think you're correct
24 that probably the best gauge the judge could use to
25 determine the functionality of the watermaster is what

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1 it does on that issue as well as resolving other issues.
2 But I think there's another gauge. The other gauge is,
3 How much of a burden is this process going to be on the
4 Court? Because I don't think that the Court appointed a
5 watermaster or agreed to appoint a watermaster in the
6 judgment with the idea that these issues would be coming
7 back. But it also did it with the idea that these
8 issues would be resolved. History shows that they
9 haven't been resolved, and I think that unless a truly
10 strong, independent watermaster is recommended to the
11 judge, we're going to see these issues be resolved and
12 resolved.

13 Because, as you can see, there's dispute among us
14 here, and we're going to continue to debate those.
15 We're going to continue to disagree. And unless you
16 have a mechanism in place that is sufficiently able to
17 deal with that, the judge is going to have to deal with
18 this thing again and again. Because I predict that
19 there is no real distinction between the nine-member
20 advisory committee consisting of largely producers and
21 the advisory committee itself, so you're going to
22 continue to see what we've seen in the past, and the
23 minority are going to continue to litigate these issues.
24 And sooner or later we're going to have to deal with it
25 because water quality is not getting better. And

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1 there's other issues too, but let's just stay with that
2 one.

3 SPECIAL REFEREE: But coming back again to
4 previous questions, it certainly is a question of
5 whether the judgment has a strong independent role for
6 watermaster right now.

7 MR. GUTIERREZ: That may be because the
8 watermaster that was selected wasn't doing its job, as
9 you indicated, and secondly, perhaps the watermaster
10 that had been appointed was more interesting -- more
11 interested in going along with the majority on the
12 advisory committee and not rocking the boat. And that's
13 exactly what happened ten years ago. It took one
14 producer to make that motion, and based upon that
15 motion, although the motion was denied, Judge Turner
16 said, Hey, you got to take care of the water quality.
17 And hasn't been done.

18 SPECIAL REFEREE: One way I thought of going back
19 at this question, since it's hard to define the role and
20 how strong it was intended to be, of the watermaster --
21 difficult language in the judgment to sort out -- what
22 is the role of the advisory committee is a different way
23 of getting at the same issue.

24 MR. GUTIERREZ: To protect its interest.

25 SPECIAL REFEREE: Thank you, Mr. Gutierrez.

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1 That the role of the watermaster -- of the
2 advisory committee is difficult -- perhaps more
3 difficult question in some ways, and I would like to
4 know what your thoughts are on 38(b) where it talks
5 about advisory committee having a duty to study and a
6 power to recommend, review, and act upon all
7 discretionary determinations. Is there some independent
8 authority in the judgment for the advisory committee to
9 act itself?

10 MR. MARKMAN: Yes.

11 SPECIAL REFEREE: And is that the authority, or
12 what is the authority?

13 MR. MARKMAN: Let me give one sentence and
14 then -- to me, it's plain that the advisory committee
15 actions are -- and if you watch them have their
16 meetings, you would see this. There's a proposed
17 watermaster action. It gets voted on. The votes are
18 counted. The percentage votes are counted. And then
19 the process follows from there. And 'course, if it's
20 80 votes, it's mandated. And so not only has that been
21 the case, but as we said before, the watermaster
22 actually contracted with the advisory committee to
23 operate the staff because the advisory committee's role
24 in this judgment as a policy-making committee is much,
25 much stronger than the watermaster's. Maybe that's the

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1 only way I can put it. You know, I once suggested
 2 during the negotiations we call this the policy
 3 committee. Unfortunately, that terminology didn't get
 4 into the judgment. It probably would have solved the
 5 problem. I think it would have been much more
 6 descriptive of what actually has happened over the last
 7 20 years.

8 SPECIAL REFEREE: I bet lots of people would like
 9 to revise some of this language.

10 Mr. Littleworth.

11 MR. LITTLEWORTH: I have here -- and I'm not sure
 12 whether this has been made available to the Court, but I
 13 have a transcript of the reporter's transcript of the
 14 proceedings before the Court when the judgment was being
 15 presented and explained to the Court, and it's
 16 extensive. And seems to me that it might be useful. I
 17 haven't gone through all of it, but there is just one
 18 sentence here -- and the Court is asking questions about
 19 the relationship with the watermaster and the producers
 20 and the public agencies -- there's a discussion about
 21 the analogy to the San Gabriel situation which Mr. Stark
 22 thinks has gone very well.

23 But there's just one sentence here, "most
 24 everything the watermaster does requires advisory
 25 committee approval." This is Don Stark speaking.

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1 That's his interpretation of the judgment. And there's
 2 further discussion about this whole issue, but it's
 3 pretty clear that Mr. Stark's interpretation was that
 4 the real authority was in the advisory committee.

5 SPECIAL REFEREE: But going back to my question
 6 of the actual authority for the advisory committee to
 7 take actions itself, the way I read this -- it's an odd
 8 phrase in 38(b) of "act upon," but to make it consistent
 9 with all the other provisions of the judgment, it would
 10 seem that the only authority the advisory committee has
 11 to act is through the vehicle of the watermaster.

12 MR. MARKMAN: I think that's correct, except it
 13 can hire counsel -- under certain circumstances it can
 14 act independently to hire counsel for a motion, like
 15 what we're doing.

16 SPECIAL REFEREE: Such as yourself.

17 MR. MARKMAN: Such as myself.

18 MR. LITTLEWORTH: The sentence that I -- the
 19 sentence following the one I read, after "most
 20 everything the watermaster does requires advisory
 21 committee approval," the next sentence is: "The
 22 advisory committee in turn goes through the watermaster,
 23 and all decisions are referable to the Court."

24 "My judgment is that we won't be in court any
 25 more than the San Gabriel has been in court," so forth.

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1 MR. MARKMAN: Can't be right all the time.

2 MS. LEVIN: Excuse me.

3 SPECIAL REFEREE: Yes.

4 MS. LEVIN: I just wanted -- if I could, briefly,
 5 just respond to some of the questions or some of the
 6 comments that various people have made and to whatever
 7 extent it might be helpful.

8 With respect to State of California's position on
 9 the judgment, we believe that the judgment now as
 10 written will accomplish, I believe, what you said at the
 11 beginning and can accomplish the language in it, that
 12 there will be a watermaster and there should be a
 13 watermaster possibly separate from the advisory
 14 committee that can accomplish some of the goals that are
 15 set forth in the judgment. We are not interested in and
 16 hope that -- it is not before this tribunal to put the
 17 advisory committee as watermaster. It's a separate
 18 issue from what duties each entity has.

19 And we agree with Mr. Markman when he started
 20 saying that most, if not all, of the actions involve a
 21 process where if it's a non-mandated decision, the
 22 watermaster, if they disagree, can then issue findings
 23 of fact and conclusions of law and go to the Court. And
 24 if it's a mandated decision, it specifically sets forth
 25 that there's an 80 percent rule and the watermaster has

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1 to agree with the advisory committee but that there is a
 2 protection.

3 And I think you asked the question -- no one
 4 answered you -- which is, Does the watermaster serve a
 5 role to protect the minority? And I believe Mr. Markman
 6 agreed that there was a very specific role, and I think
 7 the judgment does say, even though it's under the powers
 8 and functions of the pool committee in the advisory
 9 committee section. It does say on page -- I think it's
 10 22 -- that review of watermaster actions, "watermaster
 11 as to mandated action." And then it goes on: "The
 12 advisory committee or any pool committee shall be
 13 entitled to employ counsel and expert assistance in the
 14 event watermaster or such pool or advisory committee
 15 seeks court review and that the cost is spread."

16 And I think the State believes that is an
 17 important function that is in the judgment and should
 18 remain in the judgment.

19 In addition, we also believe that -- with
 20 Mr. Littleworth. The State of California through the
 21 Attorney General's Office -- I believe Mr. Edwin DeBeale
 22 was very involved over the years in negotiating the
 23 judgment and to whatever extent a declaration might be
 24 helpful, a detailed declaration -- and I will represent
 25 to the Court that this is what he has told me --

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1 Mr. Littleworth's explanation of the initial role of
2 watermaster was a discussion that the advisory committee
3 would try to specific- -- or the judgment would
4 specifically set forth or would try to specifically set
5 forth those areas where watermaster -- what -- the
6 duties and roles of watermaster. But, in general, the
7 concept was that the advisory committee would be in the
8 position to recommend and approve those certain duties
9 and that watermaster, if they -- and watermaster, if
10 they disagree, there would be a process to take it to
11 court. ==

12 I further disagree with Mr. Kidman -- or at least
13 this time I do disagree that that watermaster abdicated
14 its responsibility in some major way over the last
15 20 years any different than anyone else has abdicated.
16 I'm not talking about water quality. I think what has
17 happened -- and I've personally been involved in this
18 for about nine years -- that it -- for whatever reason,
19 the consensus process worked in this basin, even though
20 it was a bit unwieldy. I recall when Mr. Fudacz first
21 came on board, he asked me, "Why do they need so many
22 meetings?" There's an agricultural meeting, and there's
23 an appropriative pool meeting, and then there's a non ag
24 meeting. And after they've considered all of the items
25 on the agenda, the same items, then it goes to the

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1 watermaster. It goes to the advisory committee. Then
2 it again goes to watermaster. It repeats itself.

3 And what it did, even though it was unwieldy and
4 time-consuming, it ended up building some sort of
5 consensus or, perhaps in the sense of water quality, it
6 allowed people never to deal with it. But that's how it
7 worked.

8 And I do have to say that Mr. DeBeale, when he
9 told me about this situation, said most of the time the
10 watermaster does agree with the advisory committee's
11 actions. And so normally the watermaster meetings are
12 very short, and normally you probably would not have to
13 attend.

14 So that has been the history. And legally how I
15 would recommend -- and I don't believe I said this in
16 any brief, and I'm not sure anyone else did -- this
17 judgment was pursuant to a stipulation of -- it's on
18 page 2: "Stipulation for entry of judgment has been
19 filed by and on behalf of a majority of the parties
20 representing a majority of the quantitative rights
21 herein adjudicated."

22 Technically -- and I assume you could take
23 judicial notice -- this judgment is similar to a
24 judgment pursuant to stipulation which could possibly be
25 treated as a type of contract. And if it is a contract

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1 between the entities, then if the language is clear,
2 it's clear, and you can interpret it in that sense. If
3 it's ambiguous, you could possibly look to the intent of
4 the parties, which is why you're going into what was
5 intended at the beginning. But secondly, you could look
6 at the actions of the parties over 20 years.

7 I had a case where that happened to me. Ended up
8 they ruled against the State because the State paid for
9 certain things over a 20-year period and then decided
10 that the contract was unclear and shouldn't have to pay
11 for it. In this situation, the actions of the parties
12 over 20 years, I believe, has not been neglect or
13 noninvolvement. The actions is that the consensus has
14 worked and that watermaster in very few situations
15 disagreed until recently and that in most of the
16 instances they did have, as you said, under the judgment
17 very little for watermaster to do in the judgment.

18 So our position right now is that there are a few
19 important roles that the watermaster should play. Those
20 are set forth in the judgment. The nine-member board --
21 for your information, the State's in a strange position
22 because it is in the agricultural pool, so it has been
23 linked with the minority in a sense on some issues, and
24 in very many issues, very many other issues, agrees with
25 the appropriative pool, so we're in a strange position.

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1 We're in favor of water quality for the public and
2 possibly spreading the costs.

3 But what I'm saying is that the nine-member board
4 was really a consensus in general. It did have a large
5 majority at first that went to the Court, and then by
6 the time Judge Turner was able to deal with it, it lost
7 some of its majority. But the nine-member board, we
8 think, does accomplish the -- if there are checks and
9 balances, which we don't necessarily think there are,
10 but there are certain important roles the watermaster
11 should play. We believe the nine-member board can
12 accomplish that.

13 We also think that -- what you said at the
14 beginning is that perhaps there's some role for the
15 Court for oversight. And the State has said on numerous
16 occasions, Let's just get this going, and if it doesn't
17 work, we'll go back to the Court and try to think of
18 something else.

19 And I think it's important for you to know
20 possibly that everyone was hoping Judge Turner would
21 make a decision a year ago, and in general, we were all
22 feeling that no matter what the decision was at that
23 time, we were going to see how it worked, either the
24 minority or the majority. We just wanted to move on.
25 And we were not happy when it was suggested we have yet

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1 another status conference to discuss it.

2 This body is looking to the referee and the Court
3 to make a decision and make a speedy decision. The
4 State would like to keep this judgment. We think we can
5 accomplish what -- a reasonable management of the basin
6 with the nine-member board, and we would not like any
7 recommendations for amending the judgment. And I
8 believe that a decision setting forth some clear
9 guidelines for this group is what they are looking for,
10 or at least the State of California is.

11 SPECIAL REFEREE: Thank you.

12 MR. CIHIGOYENETCHE: I think it's probably
13 correct -- if I could just add a couple of things. It's
14 not so much we refer to the nine-member board -- at
15 least from my client's perspective, it's not the nine-
16 member board that concerns us; it's the composition of
17 the nine-member board. Mr. Littleworth indicated that
18 he feels a proposal is good because Chino Basin has a
19 position and others have a position. Well, I'll submit
20 to you right now that at the present time Chino Basin
21 has all five seats, and we basically are ineffective
22 because of the advisory committee running the show.

23 So I think beyond what the board is going to be
24 and what its composition is and the number on the board
25 is a ruling or an order or recommendation delineating

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1 the authority between the watermaster and the advisory
2 committee.

3 And I will take a comment from Mr. Markman I
4 agree with, and he used the words "public advocate," and
5 I think that's very important because a minority does
6 have to have a voice. And I believe that if you
7 consolidate the authority of the watermaster, the
8 positions of watermaster and advisory committee with
9 individuals who share roles or relationships or are
10 connected -- interconnected to the advisory committee in
11 that context, you're going to challenge that public
12 advocate or threaten that public advocate position.

13 MR. KIDMAN: May I just respond a little bit to
14 this --

15 SPECIAL REFEREE: I need to schedule a break for
16 the reporter.

17 (Discussion off the record)

18 MR. KIDMAN: I don't think we even want to go
19 anywhere near the place that Ms. Levin suggests, that we
20 treat this as a contract. This is a judgment. It's
21 been entered as a judgment. By its own terms the
22 stipulation does not indicate that every producer agreed
23 to it, and yet it is binding on them whether they agreed
24 to it or not. It's also binding on those that can
25 intervene after judgment. So let's not go to that place

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1 about treating this as a contract.

2 The question about the conduct of the parties
3 being an aid to interpreting a contract may have some
4 validity in a contract context, but here you've got the
5 last eight years, since 1989 when the majority, whatever
6 it is, where this function has not occurred. Basin
7 water quality management has not occurred the way that
8 Judge Turner said that it should occur. And I would
9 submit that it isn't working. It needs to be fixed. We
10 can't just let it go on, not amend it, not interpret it,
11 not deal-with it.

12 (Discussion off the record)

13 SPECIAL REFEREE: I want to come back and look to
14 follow up some of this conversation with some of my
15 questions as to what your thoughts are on whether the
16 Court has the authority under the judgment to amend or
17 modify the judgment and what that provision in the
18 judgment means to that effect. So I would like to start
19 with that after we get some lunch. Say about
20 15 minutes.

21 (Lunch recess from 12:30 to 12:48 p.m.)

22 SPECIAL REFEREE: We're ready to go back into
23 questions.

24 As I said, I'd like to have your thoughts on a
25 couple of issues, and then I'd ask you, if you wish, to

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1 make very short statements in closing after we're
2 through with these last questions, that I have at least.

3 As I said, I think an issue is whether the Court
4 has authority to amend or modify the judgment. There is
5 a judgment provision to that effect, and I'm interested
6 in your view as to whether the Court, for example, could
7 modify the judgment to clarify the roles of the
8 watermaster if that were to be found to be necessary.

9 MR. MARKMAN: Well, in response to your question,
10 the Court does have the authority to amend, interpret,
11 amplify, or modify the judgment. But interestingly
12 enough, the judgment states "upon application of any
13 party or the watermaster or the advisory committee."
14 Doesn't say the Court can institute such a process on
15 its own motion. So the possibility is always there if
16 somebody wanted to do so. The advisory committee has
17 not suggested doing so to this point. So whether the
18 Court could do that on its own motion or not, it would
19 almost have to be researched. It's one of those -- it's
20 always the case where the Court has continuing
21 jurisdiction. But the judgment only provides for it
22 upon motion.

23 MR. LITTLEWORTH: Very broad power, just
24 reserving several items. Otherwise the answer to your
25 question I think would be yes.

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1 SPECIAL REFEREE: If it's on a motion, but not
2 the Court's own motion.

3 MR. LITTLEWORTH: Well, clearly if it's on a
4 motion. Whether the Court can do it without a motion
5 isn't something that's explained here.

6 MR. KIDMAN: In paragraph 40 there's an
7 exposition of the need for flexibility because of
8 changing circumstances that may exist, and I quote: To
9 that end, the Court's retained jurisdiction will be
10 utilized where appropriate to supplement the discretion
11 herein granted to the watermaster. 'Course, we found
12 that there's not a lot of discretion in the watermaster
13 since the advisory committee gets to dictate all
14 discretionary actions. However --

15 MR. MARKMAN: We accept that as a stipulation.

16 MR. KIDMAN: However, that suggests to me that
17 the Court has retained jurisdiction to make changes and
18 to make directives, and it doesn't need to have
19 application from the parties to do so.

20 SPECIAL REFEREE: I'd like to ask a few questions
21 about -- to see if there's agreement on the roles of the
22 watermaster. I mean, I've taken some notes as we've had
23 these conversation, and I think that it is clear that a
24 role of the watermaster is to carry out the direction of
25 the advisory committee. Is there any disagreement with

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1 that? That is a role of the watermaster.

2 An additional role of the watermaster is to
3 protect minority positions where the watermaster
4 determines that they need to be given voice and to take
5 them to the Court for review. Seeing no disagreement
6 except Mr. Littleworth --

7 MR. LITTLEWORTH: I'm not sure that "minority
8 positions" is the right word. Where it differs with the
9 advisory committee. But I'm not sure that's necessarily
10 siding with the minority.

11 SPECIAL REFEREE: So with the clarification --
12 let me restate. I want to see if I can get agreement
13 here. So that a second role of the watermaster is to be
14 a vehicle to take the positions of those who may
15 disagree with the advisory committee to the Court to get
16 the Court to take a look at the issue and look at it
17 perhaps from a more basin-wide perspective. Is that
18 agreed?

19 MR. KIDMAN: I think another qualification needs
20 to be made as to whether or not the decision of the
21 advisory committee is 50 percent or mandatory
22 80 percent.

23 SPECIAL REFEREE: Well, I think that those two
24 possibilities are there but that whether one was the
25 situation or the other wouldn't affect the role that the

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1 watermaster would play.

2 MR. KIDMAN: Has that role.

3 SPECIAL REFEREE: Yes.

4 MR. KIDMAN: It has the additional ability, in
5 our view, to take independent action if it's between 50
6 and 80 percent without going to the Court.

7 SPECIAL REFEREE: But nonetheless there is a role
8 that involves taking the position of those who may
9 disagree with the advisory committee to the Court, and
10 the watermaster provides a vehicle for that.

11 MR. KIDMAN: Yes.

12 SPECIAL REFEREE: Another role is that in part 6
13 of the physical solution part of the judgment, the role
14 in carrying out the physical solution, it's a role akin
15 to the role of a steward of a resource and that the
16 Court relies on the watermaster to serve a function.
17 And that's the way the judgment is written, particularly
18 in the sections 39 through 41. Is there agreement?
19 Seems to be agreement.

20 MR. KIDMAN: Yes.

21 SPECIAL REFEREE: And I think another role that's
22 very important to the Court is that the watermaster
23 perhaps was intended to serve a function to avoid the
24 Court having to deal with very many divisive issues such
25 as it has had to deal with in the last few years, if

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1 possible. The watermaster has a function and a role to
2 try to help sort out the issues before they all have to
3 go to the Court.

4 MR. MARKMAN: Well, I'm not sure that that last
5 characterization is a watermaster function, that it's
6 supposed to sort of Kissinger all the problems so that
7 by the time it makes a decision, it's a decision that
8 wouldn't be reviewable by the Court. Because I think if
9 it's discretionary, that actually occurs -- should occur
10 at the advisory committee level. That, and I think as
11 the State explained, that's pretty much what happened
12 for a very long time without these problems, that the
13 advisory committee would make decisions on discretionary
14 matters or recommendations and they were implemented.

15 So I think if you looked at the way it worked
16 when all the producers are going through these pool
17 meetings and then the advisory committee meetings, most
18 of what came out wasn't straightened out by Chino Basin
19 Municipal Water District acting as watermaster. It was
20 straightened out in those committees. And maybe Marilyn
21 could speak more --

22 SPECIAL REFEREE: In what sense do you mean that
23 the watermaster serves as an arm of the Court?

24 MR. MARKMAN: I think that the watermaster serves
25 in two ways. One, it's implementing the judgment. I

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1 don't think it's acting as a referee trying to mediate
2 or resolve disputes. I think it's conducting the
3 physical operation for the physical solution, the staff
4 and all of the accounting and other mechanisms that you
5 need to keep track of this judgment. I think it's
6 implementing policy for the most part recommended,
7 without objection by the watermaster, by the advisory
8 committee.

9 So I think that the real -- what I'm trying to
10 say is that I think that the real decision making, where
11 there is controversy, occurs by the time the decision
12 comes out of the advisory committee. All these people
13 you see here, they're at these advisory committee
14 meetings and pool meetings, and that's where things are
15 going to get worked out if they're going to get worked
16 out. They're not going to be resolved through
17 intervention by the watermaster. At least that has not
18 happened historically, I don't believe.

19 SPECIAL REFEREE: Do you have a concept that a
20 properly functioning watermaster would have the result
21 that there would be fewer disputes reaching the Court?

22 MR. MARKMAN: I think that would help, yes.

23 SPECIAL REFEREE: So the role might be to serve
24 in ways which would, if possible, avoid issues having to
25 be raised to the Court for review.

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1 MR. MARKMAN: I think that, yes, that would be a
2 goal.

3 MS. LEVIN: And to the extent that the advisory
4 committee and the pool committee process has already
5 served, prior to the last two years, to sort out issues
6 so that they didn't have to go to the Court, the
7 consensus kind of building I was talking about, perhaps,
8 to make people feel more comfortable, it might be that a
9 proper-functioning watermaster could serve the
10 additional function, sort of in addition to the already
11 existing process, to help sort out issues so that they
12 wouldn't have to go to the Court. And that, in answer
13 to your previous question what would be a gauge of a
14 properly working watermaster, would be that there were
15 fewer issues going to the Court.

16 SPECIAL REFEREE: I'm interested in your thoughts
17 about whether there's any need to clarify or even modify
18 the judgment to assure that these roles that everyone
19 seems to agree to are carried out by any watermaster no
20 matter who the watermaster is.

21 MR. MARKMAN: I don't feel that -- I don't feel
22 that modifying the judgment is necessary to do that. I
23 think the result of this proceeding, your report, and
24 court order is going to explain to a lot of people what
25 these roles are. If somebody thinks it's necessary to

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1 memorialize that by modifying the judgment, I suppose
2 anyone could look at that and bring a motion to do so.

3 SPECIAL REFEREE: Mr. Kidman.

4 MR. KIDMAN: Believe it or not, I believe I
5 agree. I would in fact like to --

6 SPECIAL REFEREE: Whoa, stop right here.

7 MR. KIDMAN: I would like to see some of those
8 principles articulated in the Court's order in response
9 to these concerns, but I don't think we need to change
10 the judgment to do that.

11 MS. LEVIN: And to further astounding, I agree
12 with both of them that a court order would be a
13 clarifying document and that this group could then
14 decide whether it wanted to bring it back to the Court
15 to amend the judgment or to issue rules and regulations
16 that memorialize what the Court might say in that
17 regard.

18 SPECIAL REFEREE: I guess one of my observations
19 would be that whatever the Court does in terms of
20 appointment of a new watermaster, there's certainly a
21 huge premium on doing it soon and in resolving the issue
22 one way or another. But I can only think that the
23 debate will continue if there's not some assurance that
24 the watermaster will serve these functions and will take
25 on the roles that you seem to agree it should have.

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1 Because of the dissension about whether a
2 nine-member board, for example, would be the appropriate
3 watermaster appointment, is there some additional
4 assurance, some special assurance, that should be
5 considered for at least an interim period for this
6 particular watermaster, for example, or any other one
7 that's suggested? Is there some thoughts that anyone
8 has as to how they would be reassured by such an
9 appointment?

10 One of the things I threw out at the start, was
11 addressed by California counsel, to have an independent
12 expert come in and assess the optimal basin management
13 program, make recommendations, and use that process
14 somehow as a way to gauge or a standard by which to
15 measure how whatever new watermaster is appointed is
16 doing. I hear one comment in favor. I don't know that
17 I heard anyone else's position.

18 I don't know if that is going to be helpful or if
19 there is an additional or different way to approach it.
20 I think that all of this could be important no matter
21 who would be the watermaster. You could have all
22 nonproducers. You could have all producers. You could
23 have your mix. But whoever it is, there needs to be
24 some way for the Court to have an ability to assess
25 whether the judgment is being carried out appropriately.

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1 MR. MARKMAN: Two things. One, you actually, I
2 thought, put two potential gauges on the watermaster
3 board. And the reason for the nine-member board is
4 because it's diverse. And we can count -- count votes
5 all day, but we don't know that. But the two things
6 that were placed on there, one was suggested in the
7 motion, and that is, review this appointment -- sunset
8 it, review it, whatever you want to call it -- on a
9 six-month or one-year basis and see how this is working.
10 Whether or not anyone else wishes to bring it before the
11 Court, make it come before the Court.

12 And then if you add to that an assessment by
13 somebody independent from all of us to come in and look
14 and see where we are in regard to these basin management
15 issues and what -- by that, we don't mean and we don't
16 want to invite another million dollar expenditure to
17 have somebody replicate all the work that's been done,
18 but for somebody to come in and do, like, an audit
19 report to the Court on where are all the players here on
20 generating this basin -- optimum basin management plan
21 suggested by Judge Turner with a time line to go along
22 with that review, which -- maybe six months is the best
23 date we can pick -- I think would help.

24 Just from my point of view, being rather new to
25 this process, it would be okay in my view to have

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1 everyone in this room prodded along regardless of how --
2 you know, if this motion is decided, there's a new
3 watermaster, the group as a whole needs to be prodded
4 toward trying to resolve the substantive issues. And
5 that's one way to do it.

6 SPECIAL REFEREE: Might not want to call it an
7 audit report.

8 MR. MARKMAN: Well, not an aud- -- well --

9 MR. LITTLEWORTH: I think you could have an
10 independent view that would do two things. One is that
11 would assess what has been done, where this million and
12 a half dollar study is, what it concluded. I mean, look
13 at what has been done, where the desalter is, and those
14 kinds of things. And then, secondly, look at what some
15 of the problems are.

16 I think, though, that you have to really
17 circumscribe that because it's too easy -- when you hire
18 an engineering firm, pretty soon they are going to
19 develop the basin plan and you're into another very
20 large cost. You're into all these alternatives and so
21 forth.

22 And the real issues are not going to get decided
23 in the plan. The real issues are going to get settled
24 by identifying what the problems are and then having
25 people try to see if they can work out what the

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1 solutions are.

2 But I think there could be a role of a report, an
3 independent report, which would indicate where they
4 stand right now in water quality and other matters, what
5 has been done, and secondly identify the particular
6 problems that are going to need to be addressed. That
7 gives the Court some measure, then, to see what happens.

8 MR. MARKMAN: An assessment but not an audit.

9 MR. LITTLEWORTH: Okay.

10 MR. KIDMAN: Leaving aside -- which I think was
11 implicit in your question -- who or what group serves as
12 watermaster, what can we do, I think the idea of
13 establishing some bench marks is a good idea. 'Cause if
14 we have these four roles that you outlined for the
15 watermaster, in addition to that, there should be a
16 renewal, this time with specific time frames involved,
17 of Judge Turner's order to get a basin management plan
18 in place. I think that we can say in all truthfulness,
19 no one disagreeing, that that hasn't occurred. Whether
20 it was an abdication or whether it was just a result of
21 conflict, whatever it was, it didn't occur. And that
22 needs to happen. Before anybody can do an evaluation of
23 whether or not the watermaster or the advisory committee
24 or the whole regime under the judgment is working, we
25 need to have some bench marks.

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1 So I would disagree, however, with the idea that
2 we should go out and hire yet another assessment by an
3 engineering firm. What are the alternatives available?
4 I would suggest that while technology and theory in
5 groundwater management practices is advancing, it hasn't
6 advanced to the point where there's a whole bunch of new
7 things that weren't considered three or four or five
8 years ago when Mark Wildermuth did his report. And if
9 there are things that weren't considered there, the
10 parties know about it.

11 So if there's a process that's a participatory
12 process by the parties where we look at those, as you
13 suggested -- what are the things that can be done, what
14 are the actions that could be taken, and start going
15 through that -- and if something's missing, people have
16 the ability to make suggestions on what's missing. Or
17 if things are unworkable for one reason or another, then
18 you can go beyond just those principles and to how we
19 pay for it.

20 I think we can get there, but we need the Court's
21 supervision. To me, all of this other business about
22 discretionary, nondiscretionary is very, very, very
23 secondary to really getting on with planning and
24 implementing the plan. So far we've spent all of our
25 time debating process.

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1 MS. LEVIN: I just want to make one thing clear.
2 When I agreed with your suggestion that you issue
3 possibly some order of an independent technical review
4 of the optimum basin management plan rather than -- if
5 the parties couldn't agree on the list, I did not see
6 that as equivalent to a bench mark for assessing whether
7 the watermaster would be doing its job.

8 But I do think, separate and apart from that,
9 with respect to the optimum basin management plan, that
10 the Court can -- I'm rethinking it. And I believe the
11 Court or you, as the referee -- and I don't know how you
12 could serve this role legally; maybe there's some way we
13 could figure this out -- and that would be for you --
14 even though you don't have a technical background, would
15 be easy for you to sort of get a copy of the latest
16 writings of Mark Wildermuth and find out what the
17 advisory committee did, what was the vote, which plan
18 did we agree that we liked, and then find out if that is
19 really where we are and that all we were stuck on was
20 who was going to pay for it.

21 So I'm rethinking whether we need a technical
22 review rather than just a legal review or a review of
23 where we are and that in your decision, separate and
24 apart from whether that serves as a gauge, you could
25 state "This is where I think you are" and set forth some

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1 guidelines about where we need to be in the next
2 six months and that we would come back to you.
3 Because -- and this is what I'm concerned about.
4 If we start talking about hiring -- I rethought this --
5 some sort of independent technical review and you let us
6 try to resolve that, that would be another issue, I
7 believe, that would be unsolvable. We would not be able
8 to agree on which person in California does not have
9 some other interest in some other basin and couldn't be
10 totally independent. And I think it would be really
11 hard for us to do that. Because we've thought about an
12 engineering firm for watermaster, and that idea didn't
13 follow through. So if there's any way that you, as
14 referee -- because everyone has trusted this reference
15 to you -- that if you could get involved in that
16 particular part of it and also --

17 SPECIAL REFEREE: Well, as I recall, when we were
18 talking about it this morning, everyone agreed that you
19 could get together and at least scope the program
20 document. I heard that; right?

21 MS. LEVIN: I guess everyone agreed except me.

22 SPECIAL REFEREE: Is everyone rethinking that
23 now?

24 MS. LEVIN: I think everyone agreed except me.

25 SPECIAL REFEREE: So you're thinking that it's

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1 possible that we could reach an agreement if someone
2 created a vehicle to look at and comment on?

3 MS. LEVIN: If there were court supervision or
4 referee supervision of that process. I'm not sure, just
5 turning it back to us, that everyone could agree because
6 of the buzz words that people still continue to say all
7 the time when they're working with each other.

8 SPECIAL REFEREE: Well, if it were to be a
9 helpful process -- seems like it would be to me -- to
10 have it agreed upon what would be in the optimal basin
11 management program, then we could schedule a briefing
12 where a lot of work would have to be done by all of you
13 to get the declarations together as to what the optimal
14 basin management program would look like, sort those
15 through, and send them out for discussion, and you could
16 use this referee as a process to accomplish that.

17 I would think that you don't want to slow down
18 the recommendation to the Court, however, to do that.
19 But I would -- I'll think about it. I think maybe you
20 can go ahead and do both of those at the same time.

21 MR. KIDMAN: May I -- really on that point, from
22 my point of view, there needs to be some motivation,
23 some forced decision, that is, that we can't have
24 winners by virtue of nondecision, people who benefit
25 from the status quo who can prolong a decision-making

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1 process to their own benefit. I think that the idea of
2 having deadlines and actually being forced to come up
3 with plans --

4 SPECIAL REFEREE: So are you in agreement that
5 this process could create some deadlines that might get
6 something done?

7 MR. KIDMAN: Correct. Yes, I am in agreement.

8 SPECIAL REFEREE: So you're talking about a scope
9 and a process and a set of deadlines?

10 MR. KIDMAN: Yes.

11 SPECIAL REFEREE: Mr. Littleworth.

12 MR. LITTLEWORTH: I'm not sure exactly what your
13 authority is. I didn't go back and take a look --

14 SPECIAL REFEREE: I was wondering --

15 MR. LITTLEWORTH: -- take a look at your order.

16 But seems to me that the suggestion that Marilyn made is
17 a useful one. Seems to me, number one, you ought to
18 decide this motion. We really need to get going.

19 SPECIAL REFEREE: I heard that.

20 MR. LITTLEWORTH: But in addition to that, if we
21 need to get kick-started on trying to work on the
22 substance of what needs to be done, then coming back, if
23 your authority is sufficient -- and, if not, maybe we
24 can join in a request to the judge to amend it -- coming
25 back within -- I don't know what a reasonable period of

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1 time is -- six months or whatever it may be with at
 2 least the kind of assembling of information and so forth
 3 that shows where we are. And out of that we would hope
 4 we could begin to see where people need to go, and it
 5 would be the basis for some kind of a final adoption of
 6 a plan.

7 But I think if we could keep this process going a
 8 little bit, I think it's going to need some outside
 9 control --

10 SPECIAL REFEREE: Kick start.

11 MR. LITTLEWORTH: And maybe we need to go back to
 12 the Court on that, but we could do that.

13 SPECIAL REFEREE: Okay. I'm being asked to
 14 clarify here. I'll state it in more of an assumption
 15 that I've made.

16 I've been assuming that if you were to scope an
 17 optimal basin management program, that that scope -- I
 18 think we discussed this earlier -- that scope would also
 19 include the implementation at least as an issue to be
 20 addressed so that the whole document, once scoped, would
 21 stand on its own. It would be, you know, objectives,
 22 standards, and implementation all in one piece because
 23 otherwise you just have another planning document to
 24 fuss with; right?

25 Is that your concept, Mr. Littleworth?

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1 everyone's interest, mainly because we all had a fear
 2 that if we didn't, then this adjudication would not
 3 work, that we would be back in court. And everybody had
 4 a fear that suddenly this Pandora's box would be opened
 5 again.

6 And none of us wanted that because we all had
 7 something to lose. The major producers had substantial
 8 water rights to lose. We had substantial future water
 9 rights to lose because of the transitioning from
 10 urban -- from agricultural to urban.

11 And so we were very conscious of protecting
 12 everyone's interest to the point that after
 13 Judge Turner's recommendation in 1989 that we develop an
 14 optimum basin plan that was more systematic, more of a
 15 planning document, we voted in 1990 to spend over a
 16 million dollars to go through this process.

17 But it's not a simple process because there are
 18 many, many different alternatives in terms of
 19 production, in terms of alternatives for cleaning up of
 20 the basin. And most of the basin is polluted to the
 21 south, and we've all suffered because of that pollution.
 22 Ontario has shut down some wells, and now we're in the
 23 process of inheriting a major area that's polluted so
 24 that we're trying now -- after we've got this planning
 25 document in place, which has taken several years and

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1 MR. LITTLEWORTH: I'm not sure. You know, the
 2 typical plan of this kind is a whole series of
 3 alternatives and -- but you wrap that up, and there are
 4 certain critical kinds of issues. Okay. You can list
 5 those issues. If you can say here's what needs to be
 6 done and here are the issues which affect whether it
 7 will be done or how it will be done, yeah, I think you
 8 can do that.

9 But getting down to the question of real answers
 10 isn't going to be done in a plan. It's got to be done
 11 by people trying to work it out.

12 MR. TEAL: Yes. This is a little bit of insight.
 13 I've been involved in this process since 1978 and
 14 beyond, and one of the things that I think that needs to
 15 be recognized is that throughout the 18 years prior to
 16 1996, the pools and the advisory committee essentially,
 17 on 98 percent or more of the actions, have been a
 18 hundred percent consensus.

19 And one of the reasons why we were able to reach
 20 consensus, after hours and hours and hours of
 21 discussion, was that we were very intimately involved in
 22 protecting each other's interests, both the large
 23 producers -- which I represent City of Ontario, which is
 24 the largest appropriator -- and the minority
 25 appropriators. We were very careful in protecting

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1 modeling and everything else, we're now in the process
 2 of dealing with the various alternatives to the point
 3 where just recently we've reached somewhat of a
 4 consensus on a storage plan that would protect not only
 5 our right to store water without losses but also protect
 6 water quality issues, water quality interests. And that
 7 I perceive as part of an implementation of a portion of
 8 that plan that -- we started that process in 1990, a
 9 year after Judge Turner's decision.

10 And then we also dealt with -- in 1993 we adopted
 11 a resolution that provided water for the desalters in
 12 good faith. We decided in 1994-95 that probably we
 13 ought to put this in an agreement form. We had some
 14 disagreements regarding whether or not we were in fact
 15 cleaning up the basin or simply mitigating ongoing
 16 pollution, and that was a concern. And we were able to
 17 work that out to where we got the doc -- we reached an
 18 agreement that it would be for net basin cleanup if we
 19 were going to dedicate water to this desalter.

20 So we have been essentially working on
 21 implementation of portions of the basin plan that we've
 22 spent over a million -- about a million and a half
 23 dollars in developing. So there has been progress.

24 What has stalled the process, of course, is we
 25 all got hung up on who the new watermaster was going to

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1 be. Well, for 18 years basically the watermaster
2 functioned as the advisory group, and we did it through
3 consensus building because, again, we were all afraid of
4 somehow opening up the judgment. We were all afraid
5 that the judgment wouldn't work if we didn't build a
6 consensus.

7 And so if you go back through the record, you
8 know, most of our actions and all of our discussions
9 have been toward consensus building, and the process has
10 worked. Unfortunately, we got hung up now on
11 implementation of the plan because if we don't implement
12 it very carefully, there are some parties to the
13 adjudication that can suffer substantial losses. And if
14 they suffer substantial losses under how we implement
15 the plan, then basically we'll be back in court again
16 and opening up this Pandora's box that none of us want
17 to open up because we all have something to lose. We
18 all have something to gain by making the adjudication
19 work, and that's essentially what we've been attempting
20 to do for the past 18 years.

21 And when -- I might add that I was an assistant
22 to the city manager at that time and helping develop
23 this whole adjudication, and it was always clearly our
24 intent that we did not want an outside party coming in
25 and controlling our fundamental interest to make the

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1 adjudication work.

2 So, therefore, we basically structured it in such
3 a way -- and it's operated in that way -- that basically
4 all the producers, the agricultural interests, the urban
5 interests, the private water companies, the industrial
6 interests would all function as the governing mechanism.
7 So that's why this governance structure of the various
8 pools and then going to the advisory committee was
9 simply established so that you had an ability of all the
10 producers to have input into the decision-making
11 process. And for the past 18 years essentially all the
12 producers have had input into the decision-making
13 process. And Ontario has really essentially and the
14 other major producers have bent over backwards to make
15 sure that all the interests were satisfied.

16 Unfortunately, in 1989 one of the things that led
17 to the moving parties -- three minor producers taking us
18 to court were that they challenged one of the
19 fundamental rights of the producers, and that was to
20 basically store water, any water. And one of the issues
21 at that time was that Ontario for the first time placed
22 some water in storage. We were always overproducers,
23 and so that was challenged. It was a minor amount of
24 water in the scheme of things, but that was one of the
25 challenges. And that was a fundamental right under the

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1 adjudication. So, therefore, with that issue, there
2 couldn't be consensus because it was a fundamental right
3 that was being challenged, and so therefore it wound up
4 in court, unfortunately.

5 But one of the fortunate things that Judge Turner
6 did was that he did prod us into spending the necessary
7 money to conduct the studies to start the process, and
8 it is that process that's been going on since 1990 that
9 basically is beginning to work. Unfortunately, we got
10 sidetracked with the issue over the authority of the
11 watermaster versus the advisory --

12 SPECIAL REFEREE: So could you use some
13 additional prodding just at the moment, then?

14 MR. TEAL: Well, we've basically -- even with
15 this, even with court challenges and everything else, I
16 think that we've basically reached an agreement on
17 storage limits. That was a very difficult issue. Not
18 everyone's in agreement with it, but we've basically
19 agreed to disagree on the minor parts and are reaching
20 agreement on that. And probably once this process is
21 concluded with the watermaster, we will take action
22 and -- I think, and we will have storage limits. If
23 not, there's going to be another court challenge, and we
24 really don't want to see that.

25 The other issue is going to be how we distribute

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1 the costs of basin cleanup. And given the multiple
2 millions of dollars involved in that, that's going to
3 take a lot of negotiations and a lot of discussion
4 that -- because it involves each one of us, our
5 pocketbooks, and especially the large producers because,
6 you know, we're going to be -- Ontario already
7 anticipates, for example, that when we place wells in
8 the southern end of the basin -- and we will have to
9 place wells in the southern end of the basin once that
10 land is annexed -- that we're going to have to spend
11 some major dollars ourselves to put in place wellhead
12 treatment because the water is dirty. But we have to
13 produce from it so we're going to have to put into place
14 some kind of wellhead treatment, and we thoroughly
15 expect to assume a major part of that cost. We're
16 hoping to develop some plans with some other producers
17 where we can share some of that cost, but basically we
18 understand that that's going to be part of the nature of
19 water production in the future.

20 SPECIAL REFEREE: Do you also see that as an
21 integral part of the optimal basin management program
22 for this watermaster?

23 MR. TEAL: Yes, ma'am, in the sense that it will
24 evolve into that by -- out of necessity. Because it's
25 going to be a question of will it cost us more to import

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1 additional water? Probably so. So, therefore, as just
2 the nature -- it's going to be the nature of the beast
3 that in order to extract that water and maintain our
4 water rights in that area of the basin, that we will
5 have to invest a certain amount in that cleanup on our
6 own.

7 SPECIAL REFEREE: I understand.

8 Well, I've exhausted my questions for now. I
9 offered the opportunity to make short statements now.
10 Why don't we do that, and then close.

11 MR. McPETERS: I will. If you want to know, I am
12 awake. This just happens to be my 25th conference on
13 the judgment. And I think I've not only got the
14 judgment down; I think I've got every individual view
15 down.

16 I want to simply say that the best service that
17 you and Judge Gunn could do would be to bring this to a
18 conclusion rapidly. All of the rest of the things that
19 we've discussed relate to a working watermaster and a
20 working advisory committee, and we -- none of that is
21 occurring. And we've now passed one year since this
22 motion was put before the judge and probably a year
23 before that with various constituent bodies being
24 proposed, one of which was the appointment of the --
25 initially the advisory committee voted to appoint itself

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1 as watermaster. That went through the inevitable
2 negotiations, and various things happened, and we
3 finally ended up with this matter here. I think that
4 act took about a year. And then the motion has been
5 pending for more than a year.

6 So nothing is working really the way it should
7 work under anybody's interpretation of the judgment.
8 The DWR is a big disappointment. In my opinion they're
9 no more than 50 percent of the way there on the issues.
10 The issues haven't changed. It's just taken a lot of
11 time. We need to get this motion heard, and we can
12 address the rest of these issues.

13 So I would not be in favor -- or I would urge you
14 to not put anything in this recommendation that is going
15 to defer a speedy resolution of the appointment. I
16 agree -- and I fully understand the nature of the
17 problems, you know, in the basin, and somebody has to
18 address them, but I would not like to see such
19 complicated issues as water quality tied up in this
20 decision to appoint a watermaster. We need to have a
21 watermaster appointed, and we need to have it appointed
22 six months ago. We can't do anything without that.
23 Thank you.

24 MR. MARKMAN: Real quick. From the advisory
25 committee's point of view, based on this morning's

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1 discussion -- this afternoon's discussion, on the
2 nine-member board, we submit to the referee that it is a
3 completely diverse interest board, that nobody here
4 wants a permanent watermaster from outside, nobody wants
5 one public entity with its political constituency or
6 makeup to again be appointed watermaster and have to
7 deal with a repeat of the situation we've just come
8 through.

9 Nobody can think of a better idea and,
10 furthermore, nobody has presented to this referee a
11 compelling reason why this nine-member board should not
12 be appointed or why it would parrot the advisory
13 committee -- no matter how much vote counting you do, no
14 one could predict who the people on that board, knowing
15 what their function as watermaster as you outlined it is
16 or how they're going to act or vote -- and that that
17 motion ought to be granted.

18 It was also suggested in the motion that there be
19 a review of how this new watermaster board functions.
20 We agree with that. I think it was suggested six months
21 or a year in the first instance. The referee suggested
22 something like that. We concur that this ought to be
23 automatically returned to the Court without a party
24 having to file a motion to see how this is -- how this
25 new board is functioning.

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1 And finally, on the question of assessment, I'm a
2 little bit in the dark about where everybody is on
3 whether we need technical assessment of where we are. I
4 would suggest that the referee receive from Traci this
5 document we've all been talking about that cost a
6 million to a million and a half dollars, what it looks
7 like, and then decide whether a technical assessment of
8 that, on where it's been and where it's going, would
9 help the Court essentially decide how this new
10 watermaster board is functioning, how all of this is
11 functioning.

12 I don't think the advisory committee objects. We
13 would object to a repetitive expenditure of a lot of
14 money to have somebody duplicate that work as
15 distinguished from just reviewing what the situation is.
16 But we also -- I concur with Mr. McPeters that
17 this motion needs to be decided. This nine-member board
18 needs to function. It needs to be given the opportunity
19 to function and show that it can help in the resolution
20 of these problems.

21 MR. KENNEDY: On behalf of Three Valleys, I would
22 just like to thank you for the time and effort that
23 you've obviously put in on this.

24 I would agree with Mr. Markman and Mr. McPeters.
25 The process has ground to a halt. And an appointment or

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1 at least a decision on the motion needs to be made as
2 soon as possible. I would suggest that -- that your
3 recommendation to the Court be to grant the motion,
4 allow the nine-member board to have a shot at this. It
5 is an entity that is representative of all the parties
6 to the judgment, not just representative of the
7 producers, not just representative of the constituents
8 of Chino Basin Municipal Water District.

9 Secondly, you can't presume to know how that
10 entity is going to vote. I think, because of that,
11 you've got to give it a shot, give it a shot -- maybe an
12 annual review with specific directions. And if those
13 directions -- if the new board is ineffective or
14 tyrannical in that review process, then you could
15 reconstitute the board, or at that point maybe the Court
16 could go ahead and have an independent auditor come in
17 and take a look at the work that's been done. But I
18 would suggest that the nine-member board be given a shot
19 and take a crack at trying to get to the issues involved
20 in the judgment.

21 SPECIAL REFEREE: Thank you, Mr. Kennedy.
22 Ms. Levin.

23 MS. LEVIN: Just three quick things. One, with
24 respect to the optimum basin plan, I'll just reiterate
25 that I think your assistance in reviewing where we are

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1 is critical and that if, for some reason, you believe
2 there has to be a technical review, that you propose
3 what expert you would like to review it and present that
4 at some point to the group rather than asking our
5 opinion about who we think should do it.

6 The second thing is, I agree that the nine-member
7 board should be given a shot. We cannot presume to know
8 how they will vote. Most presidents are surprised
9 sometimes on their Supreme Court nominees, how they
10 vote. And I think some of the people may rise to their
11 public duty, as Mr. Kidman said in a different way, but
12 that they could vote possibly not their pecuniary
13 interest but their public interest.

14 And, lastly, being attorney general
15 representative representing state agencies -- I don't
16 represent the Department of Water Resources, and I was
17 very careful -- at least in this situation I was very
18 careful not to be involved in the process. But I do
19 have to disagree that DWR has been a disappointment.

20 DWR was given a specific duty in the court order,
21 but it was also limited in the sense that DWR had to
22 negotiate with Chino Basin as well as the advisory
23 committee, and further -- was given a further limitation
24 in the sense that it was essentially required to figure
25 out a way to continue with the staff that the advisory

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1 committee felt was important to continue.

2 Within those constraints, I think they've done an
3 excellent job. No one else has been able to get the
4 advisory committee of Chino Basin to agree on anything
5 Why should DWR have had to? And so I would just
6 disagree. And I've said --

7 SPECIAL REFEREE: Are we almost through?

8 MS. LEVIN: Yeah. I've said --

9 MR. KIDMAN: Well, golly, if we listen to
10 Mr. Teal, just everything has gone great. There is no
11 reason why any of us should be here. And I'm sure from
12 Ontario's point of view, that's true. But for some
13 reason, since 1989 till now, 1997, we haven't come up
14 with an optimum basin management plan, so everything is
15 not going great.

16 There needs to be -- almost doesn't matter who
17 the watermaster is. Let me tell you the position of my
18 client, the board -- my client's board actually took a
19 position on this. They don't think it should be Chino
20 Basin Municipal Water District anymore. They thought it
21 was okay on an interim basis, but they really took a
22 position that did not favor that. They don't think it
23 should -- whatever the panel or composition should be,
24 it should not be dominated -- should not have a
25 numerical majority composed of producers from the basin.

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1 I don't know what their position is -- whether there
2 should be any producers. We didn't get to that. I
3 don't know what their position is, whether it could be a
4 minority on that watermaster panel that represent
5 producers. But they clearly said they didn't think that
6 a majority, numerical majority, should be from the
7 producer community.

8 Yes. We don't know how anybody is going to vote.
9 I agree with that. And it may be that that rare person
10 will be appointed who ignores the pecuniary interests of
11 their masters and, you know, takes up the public
12 interest above that. It is possible. But people are
13 people, and human nature is human nature, and we need to
14 structure this thing so that human nature results in an
15 appropriate outcome rather than taking the risk that
16 people are going to do what is right. It needs to be
17 set up so that -- yes -- maybe it needs to be set up so
18 that the producers have a voice on that watermaster
19 panel. I don't really have a disagreement with that.
20 But when it comes to decisions about how we can
21 optimally manage this -- what I certainly believe is a
22 public resource, the Chino Basin, those kinds of
23 decisions should be made in the public interest first,
24 not in the public interest after we decide who's going
25 to pay for it and, you know, whose ox is being gored and

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1 all the rest.

2 So we oppose the motion to appoint a nine-
3 person -- the proposed, specifically proposed nine-
4 person panel.

5 Do we have something to suggest in the
6 alternative? Not really. There's a lot of things that
7 probably could work. But the idea of having a nine-
8 person panel, six of whom are producers, just doesn't
9 seem like the way to go to make sure that the proper
10 functions of the watermaster are carried out.

11 Could it work? Possibly. You asked that. I
12 think so. It could work. The best way to make sure
13 that it worked is to make sure that we have an order
14 that does outline what the really essential functions of
15 the watermaster will be and specifically charges whoever
16 is appointed to carry them out and establishes report-
17 back procedures, opportunities where those that may
18 disagree that everything is just fine have the ability
19 to come in and have -- make sure that their position is
20 heard as to whether or not everything is going just
21 fine.

22 One of the problems in the judgment -- not
23 suggesting that it ends up getting changed -- is that
24 there is a strong tendency for the rich to get richer
25 and the poor to get poorer. That is, representation on

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1 the advisory committee and so on gets to be established
2 according to what -- how many water rights a party holds
3 and to how much water a party produces or overproduces.
4 And it's that second part especially that allows the
5 rich to get richer and the poor to get poorer because
6 those entities that are in a part of the basin where
7 they can't produce because water quality is not suitable
8 get fewer votes as a result and those that happen to be
9 in a sweet part of the basin, where they can even
10 overproduce their water right if they wanted to and take
11 advantage of the underproduction of the others, get more
12 votes. The system gets stacked against the parties that
13 are in the lower-quality part of the basin. And
14 appointing a watermaster panel that's composed of a
15 majority, numerical majority, of producers, given the
16 way the voting rights are stacked, is hardly a solution
17 that makes any -- that gives some people, who would like
18 to see cleanup occur, confidence that it will.

19 SPECIAL REFEREE: Okay. One more.

20 MR. VAIL: Yes. I have a few comments. I think
21 everybody agrees that something needs to be done.
22 Mr. Kidman can't propose an alternative board. Advisory
23 committee has proposed a watermaster that I think
24 presents a practical solution.

25 If you look at this thing practically, the

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1 judgment gives the advisory committee certain powers.
2 Has the power to, in essence, change the watermaster.
3 There has to be compelling reasons for its choice not to
4 be adopted. It can mandate certain discretionary things
5 to the watermaster. That situation is going to persist.
6 It's going to continue on after you make your
7 reference -- your decision. So any watermaster that's
8 put in place is going to have to live in that
9 environment.

10 And nothing is served -- the basin certainly
11 isn't served by having the advisory committee and a new
12 watermaster come to loggerheads and disagree constantly.
13 We've seen how unproductive this has been.

14 The advisory committee has proposed a board that
15 it can work with. Is it going to control it? No.
16 Nobody knows how anybody is going to vote in the future.
17 Nobody even knows who the majority is going to be that's
18 going to be Mr. Kidman's tyrant. Those things will
19 shift and change in time.

20 All of the interests are represented by one vote.
21 All of the interests have a say. And the advisory
22 committee, which holds many of the sticks in this little
23 judgment, is at this time saying, Hey, we can work with
24 this. We can get things going with this. Presents a
25 practical solution to the problem.

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1 Now, put a review period on it, a year, two
2 years. That's also practical. But it provides us a way
3 to get off the dime, stop having all the attorneys sit
4 around in this room jaw at each other, and to let the
5 people who should be making the decisions start to make
6 the decisions.

7 SPECIAL REFEREE: Thank you.

8 Short.

9 MR. KOOPMAN: I've been on the ag pool since
10 1978. The majority of the ag pool is against the
11 nine-member watermaster. We see it as a mirror image of
12 the advisory committee. Everybody on that board will be
13 subject to some sort of pressure, politically or
14 otherwise.

15 Realizing that any other entity is sure bound to
16 be open to some political pressure, we think it should
17 be equalized in some way. I think one thing that was
18 kicked around at several different meetings and, I
19 think, really has the ability to be the most objective
20 would be the five-member board -- two from Chino Basin,
21 one from Three Valleys, one from Western, and one from
22 some other entity like DWR or Water Conservation or --
23 pick it.

24 When you look at the map -- and, unfortunately,
25 it's not on the wall here today -- those three entities,

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1 Chino Basin, Three Valleys, Western, cover the complete
 2 Chino Basin. They all have a vested interest in there.
 3 Yes, they're all -- you have the ability to put
 4 political pressure on them. Everybody in this room --
 5 everybody, the advisory committee -- are experts in
 6 counting votes, myself included. And the problem arose,
 7 everything with the desalter, because a number of the
 8 appropriators considered the Chino Basin was too ag
 9 friendly. What they've done is they're looking for
 10 something else where the tilt goes the other way. It
 11 comes down to cleanup, who's going to have to pay.
 12 We're going to have more issues.

13 Last week I attended the appropriative committee.
 14 There was one thing on the agenda about increasing the
 15 yield in the basin, and it was tabled. The ag pool --
 16 later in the afternoon we took a position that we think
 17 that the yield ought to be decreased because of the
 18 change in pumping patterns over the years. I have a
 19 dairy in the south. My water quality is bad. I mean,
 20 you know, out there we call it, like, Jesus water. You
 21 can get out there and walk on it. And we're almost to
 22 that point.

23 The problem is, last year we transferred roughly
 24 40,000 acre-foot to the appropriators. That's all being
 25 pumped up in the sweet part of the basin for the

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1 majority of it. You kill the flushing action of the
 2 basin as far as coming through. Our water is going bad
 3 faster than anybody ever imagined. And if they raise
 4 it, it's going to get worse faster.

5 And we need to have some changes, and we need to
 6 have a basin plan implemented. We haven't done
 7 anything, and we aren't going to do anything until we
 8 get a watermaster. And we only -- the only way we're
 9 going to stay out of court on a continual basis is that
 10 we have a watermaster that's somewhat objective. This
 11 nine-person is not an objective watermaster.

12 MR. SCHATZ: To follow on Mr. Koopman's comments
 13 and also your question earlier about whether some
 14 prodding is needed, I think clearly in the area of water
 15 quality, that's true.

16 Mr. Teal discussed there's some progress being
 17 made on the concept of storage, which is really a
 18 double-edged sword. The storage concept was actually at
 19 the heart of the '89 suit because of the impact on water
 20 quality, not because there was a problem with storage
 21 per se. So there is progress, I think, in areas where
 22 economic interests are at stake. But clearly the record
 23 shows, I think, that there hasn't been that degree of
 24 progress on water quality issues.

25 I think on the composition -- the composition of

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1 the board here is what we're really talking about. And
 2 the composition should be such that it effects a
 3 resolution. Now, we've been talking about degree of
 4 separation of powers, checks and balances. I think wha
 5 we're really talking about is diversity. Now, whether
 6 that diversity is accomplished through the composition
 7 of the board or the diversity is accomplished through
 8 separation of the powers and authorities between the
 9 watermaster board and the advisory committee I'm not
 10 sure makes that much difference, so long as that
 11 diversity represents a balanced view in getting at the
 12 beneficial use and addressing the water quality of the
 13 basin.

14 SPECIAL REFEREE: All right. I'm going to
 15 prepare a report and recommendation to the Court as soon
 16 as I can. I'm going to take it directly to the Court so
 17 that that will expedite things rather than to come back
 18 with a proposal to you first to comment on. You can
 19 still comment to the Court on it. And I will do that as
 20 soon as I can. I would imagine it would take me a
 21 month, but I will move forward.

22 I appreciate your all coming, and thank you for
 23 your briefs. I hope that we will be of assistance in
 24 the recommendation.

25 (The proceedings concluded at 1:48 p.m.)

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REPORTER'S CERTIFICATE

1 I, Sara M. Gusseck, a certified shorthand
 2 reporter licensed by the State of California, hereby
 3 certify:

4 That the said proceedings were taken down by me
 5 in stenotype and thereafter reduced to typewriting by
 6 computer-aided transcription under my direction and are
 7 a true record of the proceedings, to the best of my
 8 ability.

9 I further certify that I am not in any way
 10 interested in the outcome of this action and that I am
 11 not related to any of the parties thereto.

12 Witness my hand the 5th day of November, 1997.

13 SARA M. GUSSECK, C.S.R. #2276

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