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16 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
17 FOR THE COUNTY OF SAN FRANCISCO

18 SAN DIEGO COUNTY WATER  
19 AUTHORITY,

20 Petitioner and Plaintiff,

21 vs.

22 METROPOLITAN WATER DISTRICT OF  
SOUTHERN CALIFORNIA; ALL PERSONS  
INTERESTED IN THE VALIDITY OF THE  
23 RATES ADOPTED BY THE  
METROPOLITAN WATER DISTRICT OF  
24 SOUTHERN CALIFORNIA ON APRIL 10,  
2012 TO BE EFFECTIVE JANUARY 1, 2013  
25 AND JANUARY 1, 2014; and DOES 1-10,

26 Respondents and Defendants.

Case No. CPF-10-510830  
Case No. CPF-12-512466

**METROPOLITAN WATER DISTRICT  
OF SOUTHERN CALIFORNIA'S  
SUPPLEMENTAL MEMORANDUM OF  
POINTS AND AUTHORITIES RE  
PREFERENTIAL RIGHTS**

Hon. Curtis E.A. Karnow  
Dept.: 304

Trial: Completed

Actions Filed: June 11, 2010; June 8, 2012

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1 **PRELIMINARY STATEMENT**

2 SDCWA has argued that Section 4.1 of the Exchange Agreement applies to the  
3 determination of preferential rights. Yet nothing in that section, nor elsewhere in the Exchange  
4 Agreement, states or means that payments under the agreement are to be included in the  
5 preferential rights calculation. First, Section 4.1 concerns only “*Metropolitan’s* ordinances, plans,  
6 programs, rules and regulations.” Preferential rights are none of those; they are governed by state  
7 statute.

8 Second, Section 4.1 provides only that certain water under the Exchange Agreement will  
9 be treated “in the same manner as the Local Water of other Metropolitan member agencies.” No  
10 payments by member agencies for Local Water are included in the preferential rights calculation.

11 In addition, SDCWA has ignored the exception stated in Section 4.1. That section ends  
12 with the clause “except as provided in Paragraphs 4.2 and 5.2.” Section 4.2 provides that  
13 Exchange Water “shall be characterized as Metropolitan water and not as Local Water only for the  
14 limited purposes of Paragraph 5.2.” Section 5.2 is the payment provision, specifying the amount  
15 SDCWA must pay for the Exchange Water that MWD delivers. SDCWA is paying for MWD  
16 water. By statute, purchases of water are excluded from the preferential rights calculation.

17 Preferential rights are governed by Section 135 of the Metropolitan Water District Act  
18 (“MWD Act”). The Court of Appeal construed the meaning of Section 135 in *San Diego County*  
19 *Water Authority v. Metropolitan Water District of Southern California*, 117 Cal. App. 4th 13  
20 (2004), holding that Section 135 exclusively governs the determination of preferential rights, *id.* at  
21 24, and further holding that MWD’s interpretation and implementation of that statute – and any  
22 section of its enabling Act – is entitled to great deference,<sup>1</sup> *id.* at 22. Because the parties agreed  
23 that the water SDCWA pays for under Section 5.2 is Metropolitan water, the Exchange Agreement  
24 has made SDCWA’s payments for the purchase of water, which are accordingly excluded from the  
25 preferential rights calculation.

26 \_\_\_\_\_  
27 <sup>1</sup> This Court has likewise ruled that it “should afford great weight to Metropolitan’s  
28 interpretation of its implementing statute . . . .” Nov. 5, 2013 Order at 24.

1 ARGUMENT

2 **I. SECTIONS 4.1 AND 4.2 DO NOT SUPPORT SDCWA’S PREFERENTIAL**  
3 **RIGHTS CLAIM**

4 SDCWA has argued that Exchange Water is “Local Water” under Section 4.1. Trial Tr.  
5 2009:8-2010:8. In its oral argument SDCWA did not, however, explain how this section logically  
6 leads to the conclusion that payments under the Exchange Agreement are to be included in the  
7 preferential rights calculation. In any event, it suffers two fatal flaws: Local Water has nothing to  
8 do with preferential rights, and Section 4.1 has an exception that makes clear that SDCWA is not  
9 paying for Local Water but instead for MWD water.

10 **A. Even If Preferential Rights Were a MWD “Plan,” Section 4.1 Does Not Help**  
11 **SDCWA**

12 Section 4.1 of the Exchange Agreement provides:

13 4.1 Exchange Water as an Independent Local Supply. The Exchange Water  
14 shall be characterized *for the purposes of all of Metropolitan’s ordinances, plans,*  
15 *programs, rules and regulations,* including any then-effective Drought  
16 Management Plan, and for calculation of any Readiness-to-Serve Charge share, in  
the same manner as the Local Water of other Metropolitan member agencies,  
except as provided in Paragraphs 4.2 and 5.2.

17 *Id.* (emphasis added).

18 Preferential rights are not one of “Metropolitan’s ordinances, plans, programs, rules and  
19 regulations.”<sup>2</sup> Preferential rights were established by the state Legislature in Section 135 of the  
20 MWD Act. SDCWA’s person most knowledgeable on preferential rights, Dennis Cushman,  
21 conceded that preferential rights are “a statutory right embodied in the Metropolitan Water District  
22

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23 <sup>2</sup> The reference in Section 4.1 to “any . . . Drought Management Plan” is not a reference to  
24 preferential rights. Drought Management Plans are created and established by MWD’s Board of  
25 Directors, and are implemented in the event of serious droughts. See MWD’s First Amended  
26 Answer to Third Amended Complaint at ¶ 23(j). Preferential rights concern each member  
27 agency’s “right to purchase . . . a portion of the water served by the district,” regardless of a water  
28 shortage or any other circumstance. MWD Act § 135; see also Cushman 1020:14-18; Skillman  
1846:19-25. Likewise, Section 4.1’s other example, the Readiness-to-Serve Charge, is a charge to  
member agencies created and established by the MWD Board. MWD Admin. Code § 4402.

1 Act itself” and the calculations are made under that statute. Cushman 1019:20-1020:13; *see also*  
2 Skillman 1846: 6-12.

3 Section 4.1 provides that “Exchange Water shall be characterized . . . in the same manner  
4 as the Local Water of other Metropolitan member agencies . . . .”<sup>3</sup> This provision is of no  
5 assistance to SDCWA because *no* payments by member agencies for Local Water are included in  
6 the preferential rights calculation. The only payments by member agencies that MWD includes in  
7 the preferential rights calculation are property taxes, two fixed charges (the Readiness-to-Service  
8 Charge and the Capacity Charge), and revenue from the construction of service connections.  
9 Skillman 1847:5-15. All member agencies are treated the same: MWD includes in the calculation  
10 these same four components – and excludes all other payments – for all member agencies.  
11 Skillman 1848:2-16.

12 Consequently, even if preferential rights were a MWD “ordinance, plan, program, rule or  
13 regulation,” the Exchange Agreement would merely require MWD to treat SDCWA the same as  
14 all other member agencies, which it does. Conversely, if MWD were to include SDCWA’s  
15 Exchange Agreement payments in the preferential rights calculation, MWD would be treating  
16 SDCWA differently from, and better than, the other member agencies, in violation of Section 4.1.

17 **B. SDCWA’s Argument Ignored the Exception in Section 4.1, Which Makes**  
18 **Clear that SDCWA Is Paying for MWD Water, and Purchases of Water Are**  
**Excluded from Preferential Rights**

19 In SDCWA’s closing argument, it cited Section 4.1 but failed to discuss the last clause:  
20 “Exchange Water shall be characterized . . . in the same manner as the Local Water of other  
21 Metropolitan member agencies, *except as provided in Paragraphs 4.2 and 5.2.*” § 4.1 (emphasis

22

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23 <sup>3</sup> The Exchange Agreement defines “Local Water” as “water supplies not served by  
24 [MWD],” such as ground water and recycled water, that are “acquired, owned or produced by  
25 local agencies.” § 1.1(q). Characterizing Exchange Water as Local Water for certain purposes  
26 means, for example, that SDCWA has water that is not subject to a drought allocation plan. *See*  
27 MWD’s First Amended Answer to Third Amended Complaint at ¶ 23(b)(vii). It also means  
28 SDCWA pays a lower Readiness-to-Serve Charge, since that fixed charge is based on a ten-year  
rolling average of each member agency’s purchases of MWD water. *See id.* at ¶ 23(b)(vi); MWD  
Admin. Code § 4402.

1 added). Section 4.2, in turn, provides that Exchange Water shall be characterized as “Metropolitan  
2 water” for purposes of Section 5.2:

3 4.2 Exception for Interim Agricultural Water Program and Determination of  
4 Price. Notwithstanding the provisions of Paragraph 4.1, *the Exchange Water*  
5 *delivered to SDCWA shall be characterized as Metropolitan water* and not as Local  
6 Water only for the limited purposes of Paragraph 5.2 and the Interim Agricultural  
7 Water Program.

8 *Id.* (emphasis added).

9 Section 5.2 is the price provision. Therefore, when Section 4.2 (characterizing the water as  
10 MWD water for purposes of Section 5.2) is read together with Section 5.2 (the price of the water),  
11 the two sections provide that SDCWA is paying for MWD water; in other words, the purchase of  
12 water.<sup>4</sup> The preferential rights statute *expressly excludes payments for the “purchase of water.”*  
13 MWD Act § 135 (emphasis added). Thus, Sections 4.2 and 5.2 collectively establish that  
14 SDCWA is paying for MWD water, which the statute requires MWD to exclude.<sup>5</sup>

15 **II. THE EXCHANGE AGREEMENT’S PROVISIONS ARE CONSISTENT WITH**  
16 **THE LAW ON PREFERENTIAL RIGHTS AND LONG-STANDING PRACTICE**

17 **A. SDCWA’s Payments Are Water Rates, Which Are Excluded from Preferential**  
18 **Rights**

19 Ultimately, it does not matter whether SDCWA’s payments are deemed payments for  
20 “Local Water” or “Metropolitan water.” Either way, those payments must be treated in  
21 accordance with the Court of Appeal decision that held that the exclusion for the “purchase of  
22 water” applies to all water rates. *San Diego*, 117 Cal. App. 4th at 27-28. The Court of Appeal  
23 rejected SDCWA’s argument that only payment for “the cost of the water resource” itself may be  
24 excluded from the preferential rights calculation, *id.* at 26, which is the same argument SDCWA  
25 reasserts in this case.

26 <sup>4</sup> MWD’s Interim Agricultural Water Program provided interruptible MWD water at  
27 discounted rates for agricultural use. MWD Admin. Code §§ 4900 *et seq.*

28 <sup>5</sup> As explained in MWD’s Closing Brief, MWD’s invoices for the Exchange Agreement  
payments have always been for the purchase of MWD water, with a credit for the supply of water  
that SDCWA traded in-kind. *See, e.g.,* DTX-1130 at -657. Cushman, SDCWA’s person most  
knowledgeable on both preferential rights and breach of contract, agreed with this fact. Cushman  
1094:13-17, 1095:9-19. SDCWA always paid these invoices without objection.

1 SDCWA's payments under the Exchange Agreement are volumetric, *i.e.*, per acre-foot,  
2 water rates: the System Access Rate (SAR), the System Power Rate (SPR), and the Water  
3 Stewardship Rate (WSR). Under *San Diego*, member agency payments of volumetric water rates  
4 are excluded from the preferential rights calculation. MWD excludes payment of these rates for  
5 all member agencies. *See Skillman 1847:16-1848:16*. If MWD were to include SDCWA's  
6 payments of the SAR, SPR, and WSR, it would violate the statute as interpreted by the Court of  
7 Appeal. Furthermore, it would disadvantage other member agencies because an increase in any  
8 member agency's share of preferential rights decreases other member agencies' shares. *See, e.g.*,  
9 *Cushman 1084:21-1085:1*. Granting preferential rights to SDCWA for the payment of the same  
10 volumetric water rates charged to all member agencies would be inconsistent with SDCWA's  
11 argument that under Section 4.1 it should be treated in the same manner as other agencies. These  
12 sections make clear that the payments must be excluded from the preferential rights calculation in  
13 compliance with state law.

14 **B. SDCWA Knew When It Entered into the 2003 Exchange Agreement that**  
15 **MWD Excluded Payment of Volumetric Water Rates from Preferential Rights**

16 Finally, when the Exchange Agreement was negotiated and executed, MWD had for many  
17 years excluded from the preferential rights calculation payments of water rates, a fact SDCWA  
18 knew. *Skillman 1847:16-1848:16; see also Cushman 1077:23-1079:1*. Indeed, at that time  
19 SDCWA had already lost its preferential rights case before the trial court. *San Diego*, 117 Cal.  
20 App. 4th at 22 (noting that the trial court filed judgment on March 25, 2002). If the parties had  
21 intended to change MWD's long-standing practice and to provide for a calculation contrary to the  
22 trial court's ruling, the parties would have said so. But, even if that had occurred, the next year the  
23 Court of Appeal's 2004 decision would have rendered such a provision illegal.

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**CONCLUSION**

For the foregoing reasons and those set forth in MWD’s Closing Brief, the Court should find that SDCWA did not prove a miscalculation of preferential rights.

DATED: June 19, 2015

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By \_\_\_\_\_

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I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 865 South Figueroa Street, 10th Floor, Los Angeles, California 90017-2543.

On June 19, 2015, I served true copies of the following document(s) described as

**METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S  
SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES RE  
PREFERENTIAL RIGHTS**

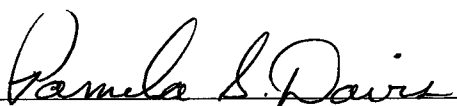
on the interested parties in this action as follows:

**SEE ATTACHED LIST**

**BY FILE & SERVEEXPRESS:** by causing a true and correct copy of the documents(s) listed above to be sent via electronic transmission through File & ServeXpress to the person(s) at the address(es) set forth below.

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

Executed on June 19, 2015, at Los Angeles, California.

  
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Pamela S. Davis

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