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15 California

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,  
25 2012 TO BE EFFECTIVE JANUARY 1, 2013  
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  
OBJECTIONS TO PHASE II TENTATIVE  
STATEMENT AND PROPOSED  
STATEMENT OF DECISION**

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

Trial: Completed

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

1 Metropolitan Water District of Southern California (“MWD”) respectfully submits these  
2 objections to the Court’s Phase II Tentative Statement and Proposed Statement of Decision  
3 (“Tentative Statement”), pursuant to Code of Civil Procedure §§ 632 and 634.

4  
5 **I. LEGAL STANDARD FOR OBJECTIONS TO TENTATIVE STATEMENT**

6 A statement of decision is required to explain the factual and legal basis for the Court’s  
7 decision as to each of the principal controverted issues at trial. Code Civ. Proc. § 632.

8 “The main purpose of an objection to a proposed statement of decision is not to reargue the  
9 merits, but to bring to the court’s attention inconsistencies between the court’s ruling and the  
10 document that is supposed to embody and explain that ruling.” *Heaps v. Heaps*, 124 Cal. App. 4th  
11 286, 292 (2004). “By filing specific objections to the court’s statement of decision a party  
12 pinpoints alleged deficiencies in the statement and allows the court to focus on the facts or issues  
13 the party contends were not resolved or whose resolution is ambiguous.” *Golden Eagle Ins. Co. v.*  
14 *Foremost Ins. Co.*, 20 Cal. App. 4th 1372, 1380 (1993). The objections must focus the Court on a  
15 particular omission or ambiguity in the statement and provide the Court with meaningful guidance  
16 as to how to correct each particular defect. *Ermoian v. Desert Hosp.*, 152 Cal. App. 4th 475, 498  
17 (2007).

18 MWD has taken seriously the Court’s directive to focus its objections on material  
19 omissions or ambiguities in the Tentative Statement. MWD is not rearguing the merits of the  
20 case. However, for the Court’s benefit in preparing its final decision and to assist the Court of  
21 Appeal in its review of the issues on appeal, MWD believes these matters should be brought to the  
22 Court’s attention pursuant to Code of Civil Procedure § 634.

1 **II. OBJECTIONS**

2 **A. The Basis Of The Finding Of Breach Is Not Clear, Because The Court's Phase**  
3 **I Rulings Were In The Wheeling Context, While SDCWA's Phase II Contract**  
4 **Claim Concerns The Exchange Agreement**

5 The Tentative Statement concludes: "Because Met's charges were not consistent with law  
6 and regulation, Met breached § 5.2 of the Exchange Agreement. PTX-65 § 5.2." Tentative  
7 Statement, 10:23-11:2 (citing the Exchange Agreement's price provision). The Tentative  
8 Statement explains:

9 In Phase 1, I held that Met's conveyance rates *over-collect from wheelers* because  
10 Met allocated all of the State Water Project costs for transportation of purchased  
11 water to its conveyance rates and all of the costs for conservation and local water  
supply development programs to its conveyance rates. April Statement of  
Decision, 65. *The same logic applies to the Exchange Agreement.*

12 *Id.* at 13:14-19 (emphasis added).

13 There has not been a finding that MWD's rates are inconsistent with law or regulation  
14 outside of the wheeling context. As the Court stated, the Phase I Statement of Decision  
15 invalidated certain MWD rates on the basis that they "over-collect from wheelers." *Id.* at 13:14-  
16 15; *see also* Phase I Statement of Decision, 1-2, 55, 60-61, 65. The Court thus invalidated rates to  
17 the extent a wheeler is paying them, *i.e.* to the extent the rates are charged in a wheeling  
18 transaction. *Id.* Here, the parties agree wheeling does not occur under the Exchange Agreement.  
19 PTX-224, DTX-44a, DTX-78, DTX-1143; Stapleton 1574:9-1581:16. There was no ruling in  
20 Phase I that any MWD rate over-collects from non-wheelers.

21 The Tentative Statement does not explain the Court's above-quoted finding that "[t]he  
22 same logic applies to the Exchange Agreement." The parties agree that a wheeling transaction is  
23 "radically different" than the Exchange Agreement. Stapleton 1576:23-1578:23.

24 For these reasons, the basis of the Court's ruling that MWD breached the Exchange  
25 Agreement by charging a price that was invalidated in Phase I is not resolved and the ruling is  
26 ambiguous. The ruling of contract breach is inconsistent with the documents that are supposed to  
27 embody and explain that ruling, the Phase I Statement of Decision and the Tentative Statement.

1                   **B.       The Tentative Statement Misstates MWD’s Damages Position**

2                   The Tentative Statement accepts San Diego County Water Authority’s (“SDCWA”)  
3 asserted damages methodology and amount, but also acknowledges that it may overcompensate  
4 SDCWA. Tentative Statement, 17:1-7. The Tentative Statement supports this ruling in part by  
5 finding: “There is no alternate methodology available.” *Id.* at 17:8.

6                   MWD presented an alternate methodology. MWD established through witness testimony  
7 and documents, which were admitted into evidence, that during the four years in question MWD’s  
8 deliveries to SDCWA under the Exchange Agreement were 40% State Water Project (“SWP”)  
9 water and 60% Colorado River water. Yamasaki 1684:2-8; DTX-1156. MWD’s rates expert  
10 testified that under cost causation principles, it would be appropriate for MWD to have charged  
11 SDCWA 40% of SWP costs under the Exchange Agreement during these years, and this testimony  
12 was admitted into evidence. Woodcock 1903:4-25; *see also* Order Granting in Part and Denying  
13 in Part San Diego’s Motion to Strike, 5:10-15.<sup>1</sup>

14                   For these reasons, the controverted issue of damages is not resolved, and the Tentative  
15 Statement is ambiguous and inconsistent with the record. The ruling concerning damages is based  
16 at least in part on a finding that MWD presented no alternate methodology, when MWD did  
17 present an alternate methodology which has not been addressed in the Tentative Statement.<sup>2</sup>

18 \_\_\_\_\_  
19                   <sup>1</sup> The Court previously ruled that the proper measure of damages is an amount MWD could  
20 have lawfully charged versus what it did charge. Nov. 4, 2014 Order re Measure of Damages, 8:8-  
21 11. MWD’s Manager of the Budget and Financial Planning Section was precluded from entering  
22 into evidence the calculation of the amount MWD could have charged under this alternate  
23 methodology versus what it did charge. Skillman 1821:5-1834:1.

24                   <sup>2</sup> The Tentative Statement’s finding that it was not proper for MWD to argue in the  
25 alternative as to damages (Tentative Statement, 14:7-17 and n. 21) is ambiguous, because  
26 SDCWA was permitted to argue in the alternative as to damages. MWD had asserted that the  
27 Court does not have jurisdiction to determine damages in this procedural posture (where SDCWA  
28 chose to litigate its rate challenge and breach of contract claims in the same action, instead of  
litigating breach of contract after a final rates decision), but if the Court disagreed, then  
alternatively SDCWA had failed to prove damages. *See, e.g.*, Joint Case Management Statement  
for July 2, 2014 Case Management Conference (“July 2014 CMC Statement”), 12:16-15:5, 16:1-  
17:3; MWD’s Motion to Dismiss for Lack of Subject Matter Jurisdiction.

(footnote continued)

1           **C.     The Tentative Statement Does Not Address The Controverted Issues Of**  
2           **Breach, Consent, and Illegality In Light Of The Undisputed Evidence That**  
3           **The Exchange Agreement’s First Year Price Was Comprised Of Rates That**  
4           **The Court Invalidated In Phase I**

5           Concerning the controverted issue of breach, the Tentative Statement states:

6           To escape this result [that Met breached the Exchange Agreement], Met argues that  
7           San Diego did in fact agree to Met’s existing rate structure by (1) agreeing to an  
8           initial price of \$253, based in turn on Met’s existing rate structure . . . Regardless of  
9           the parties’ thinking which led to the initial price, the parties just agreed to that  
10          number.

11          Tentative Statement, 11:3-5, 10-12. The Court’s ruling of breach is therefore based in part on a  
12          finding that the price in the first year of the Exchange Agreement was only a fixed number.

13          Concerning the controverted issue of MWD’s affirmative defense of consent, the Tentative  
14          Statement states:

15          San Diego agreed to pay only (1) a fixed initial rate; and (2) a rate set pursuant to  
16          applicable law.

17          Tentative Statement, 20:10-12. The Court’s consent ruling is therefore based in part on a finding  
18          that the price in the first year of the Exchange Agreement was only a fixed initial rate.

19          Similarly, concerning the controverted issue of MWD’s affirmative defense of illegality,  
20          the Tentative Statement finds that the initial price was not illegal because “[f]ixing a \$253 price is  
21          not illegal”:

22          \_\_\_\_\_

23          SDCWA had argued that the Court should not decide damages, because this was governed  
24          by a clause akin to liquidated damages in the Exchange Agreement. *See, e.g.*, July 2014 CMC  
25          Statement, 4:2-6:28; SDCWA’s Opening Brief Demonstrating the Section 12.4(c) of the Exchange  
26          Agreement Is Enforceable as a Measure of Damages. The Court asked SDCWA whether, if it was  
27          wrong on its liquidated damages argument, it had another theory of damages. SDCWA’s counsel  
28          responded: “We have not created that theory yet . . . But if you surprise us and find it  
un enforceable, our position is going to be, you can’t have a contract with no remedy, and we’ll  
think up something . . . let’s worry about that later if you find that 12.4(c) is un enforceable.  
Because I don’t see how you can, frankly.” Aug. 6, 2014 Hearing Transcript, 21:2-28. After the  
Court rejected SDCWA’s liquidated damages argument, SDCWA then presented a different  
damages case at trial. As SDCWA and MWD both have done, parties may assert causes of action  
or defenses in the alternative, even where these are considered inconsistent or contradictory.  
*Brown v. Yocum*, 113 Cal. App. 621, 623 (1931).

1 Met argues that the Exchange Agreement is void as illegal if Met's rate structure or  
2 rates in existence at the time the parties entered into the Exchange Agreement were  
3 illegal. Met Closing Brief, 31-33. This is so because if San Diego is right, Met's  
4 performance of the price term was unlawful, Met says, because the rate structure  
5 includes unlawful rates. Met Pre-Trial Brief, p. 12.

6 Although San Diego agreed not to challenge the manner in which Met set its charge  
7 or charges for the following five years, the parties did not agree the setting of  
8 charges was legal or illegal. Fixing a \$253 price is not illegal. Nor is it illegal to  
9 require Met to set its charges for the conveyance of water pursuant to applicable  
10 law and regulation; precisely the opposite is true. The parties obviously bargained  
11 for—by definition—a *legal* price term.

12 Tentative Statement, 23:10-21. The Court's ruling on the illegality defense is therefore based on  
13 the finding that the first year price is only a fixed number, which was not comprised of the rates  
14 found to be illegal.

15 The evidence, however, was undisputed that the parties agreed that the price in the first  
16 year was not just a fixed, random number. The parties agreed it was comprised of the same rates  
17 that comprised the price in subsequent years. These are the rates the Court determined were  
18 illegal and MWD was in breach for charging. The parties stated the first year price as a number,  
19 rather than the rate components comprising it, because MWD had already set the rates' numeric  
20 amounts for that year, so it was possible to state their total for year one. Slater 1207:13-1209:1,  
21 1212:23-1213:1, 1214:1-1217:6, 1223:18-1225:1, 1229:13-1230:18; Stapleton 1477:19-25,  
22 1480:13-22, 1565:9-1566:11, 1567:17-19, 1594:25-1595:8, 1594:19-1595:21; Cushman 1030:11-  
23 1031:20; Kightlinger, 1292:6-16, 1294:13-1297:2; DTX-50, DTX-859.

24 For example, SDCWA negotiator Scott Slater, who proposed the 2003 Exchange  
25 Agreement terms, testified:

26 Q. And you recall – we looked at it during your direct examination – that the initial  
27 price in the exchange agreement was specified at \$253; right?

28 A. Correct.

Q. And you knew when you negotiated the exchange agreement, that the initial price  
included those various costs which San Diego is challenging in this case; correct?

A. Correct.

Q. And the price represented the sum of those costs; that is, the system access rate, the  
power rate, and the water stewardship rate; correct?

A. Correct.

Slater 1208:11-23.

1 SDCWA's other lead negotiator, General Manager Maureen Stapleton, testified:

2 Q. You understood that \$253, probably beating the dead horse here, but it included  
3 that system access rate, the power rate with the State Water Project costs built into  
4 both of them, and the water stewardship rate; correct?

4 A. Correct.

5 Stapleton 1477:19-25.

6 For these reasons, the controverted issues of breach and the defenses of consent and  
7 illegality, are not resolved and the Tentative Statement is ambiguous. The rulings are based on a  
8 finding that the first year's price was not comprised of the invalidated rates; yet, the parties agreed  
9 the first year price was comprised of these rates. As to breach and consent, the Tentative  
10 Statement does not address the issue in light of the agreed evidence that SDCWA proposed and  
11 agreed to an initial price comprised of invalidated rate components. As to illegality, the Tentative  
12 Statement also does not address this issue in light of the agreed evidence that the first year price  
13 was comprised of invalidated rate components. Under these agreed facts, if the price was  
14 unlawful at any later point, it was unlawful at inception. *See, e.g.*, Tentative Statement, 20:19-21  
15 ("Each time Met set an unlawful rate, Met breached its obligations under the Exchange  
16 Agreement").

17 **D. The Damages Award Is Inconsistent With The Tentative Statement's**  
18 **Conclusion That The First Year Price Was Legal**

19 As explained above, the Tentative Statement states: "Fixing a \$253 price is not illegal."  
20 Tentative Statement, 23:18-19. As a result of this finding, the controverted issue of damages is  
21 not resolved, and the Tentative Statement is ambiguous. The damages award is inconsistent with  
22 the Tentative Statement explaining and embodying that decision.

23 If the Tentative Statement is not modified based on the prior objection, then the Tentative  
24 Statement has determined a price that MWD could have lawfully charged under the Exchange  
25 Agreement: the fixed price of \$253 per acre-foot. As noted, the Court ruled that the proper  
26 measure of damages is an amount MWD could have lawfully charged versus what it did charge.  
27 Nov. 4, 2014 Order re Measure of Damages, 8:8-11. Therefore, under the Tentative Statement,  
28

1 damages cannot be more than \$114,376,896,<sup>3</sup> which is the total difference between \$253 per acre-  
2 foot and the amount that MWD charged (\$372 in 2011, \$396 in 2012, \$453 in 2013, and \$445 in  
3 2014).<sup>4</sup>

4 **E. The Damages Award Is Inconsistent With SDCWA's Testimony That**  
5 **Damages Were To Be Calculated After MWD Set New Rates**

6 The Tentative Statement states: "the notion that [the parties] intended to have the  
7 anticipated contract dispute resolved [by deferring a calculation of damages until after Met resets  
8 rates] is inconceivable." Tentative Statement, 15:1-2. The Tentative Statement omits SDCWA's  
9 testimony that damages were to be calculated after MWD set new rates.

10 SDCWA's person most knowledgeable on contract damages, Dennis Cushman, testified at  
11 his deposition that "Metropolitan [would] have to go back and set and adopt lawful rates":  
12

13 Q. So it would not – so the impact to San Diego, at least for the time frame covered by  
14 this letter, wouldn't be \$37,824,313 netted out, it would be somewhat less than that  
15 to take into account the fact that San Diego would be paying a somewhat higher  
16 water supply rate if the re-allocation that San Diego requested actually occurred?

16 A. It depends. This litigation seeks to invalidate the rates Metropolitan adopted for  
17 2011 and 2012, subsequent case, '13 and '14. Presuming the Water Authority  
18 prevails on that, the judge will invalidate Metropolitan's rates, and Metropolitan  
19 will have to go back and set and adopt lawful rates. How Metropolitan goes back  
20 and adopts lawful rates and charges is at this point unknown. So how it might  
21 affect the Water Authority's payments is unknown.

22 DTX-710 at 443:10-444:2. Cushman reiterated this belief in his Phase II trial testimony, agreeing  
23 that "because the Court invalidated Met's rates, Met will have to go back and adopt lawful rates."  
24

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25 <sup>3</sup> This figure does not include an escalator for the \$253 number, which would be appropriate  
26 based on the parties' intent that the price would escalate over time. Slater 1218:18-22, 1219:2-  
27 1220:22; Stapleton 1465:18-21, 1478:5-13, 1478:25-1479:6, 1482:25-1483:3; DTX-50.

28 <sup>4</sup> As explained, the parties agreed the first year price was not just a number and was  
comprised of the invalidated rates. However, if there is a finding that the first year price is only a  
number, then this methodology applies to affect damages. With the Tentative Statement's  
inclusion of the finding but omission of application of the methodology to damages, the Tentative  
Statement does not resolve the controverted issue of damages and is ambiguous.



1 Cushman 1053:1-21.

2 The Tentative Statement's damages award is inconsistent with this evidence. Due to the  
3 omission of the evidence, the controverted issue of damages is not resolved and the Tentative  
4 Statement is ambiguous.

5 **F. The Tentative Statement Omits Key Evidence Regarding The Parties'**  
6 **Agreement And The Benefits SDCWA Accepted**

7 The Tentative Statement omits significant aspects of the 1998 and 2003 Exchange  
8 Agreements, and the benefits SDCWA accepted under the 2003 Exchange Agreement.

9 As to the 1998 Exchange Agreement, the Tentative Statement states:  
10 The price term was close to an \$80 per acre-foot wheeling rate proposed by  
11 Department of Water Resources Director David Kennedy in January 1998 as a  
12 compromise between wheeling rates advocated by Met and San Diego in a dispute  
13 over an appropriate wheeling rate. PTX-481 at MWD 2010-00264720.

14 Tentative Statement, 3:2-6.

15 As to the 2003 Exchange Agreement, the Tentative Statement states:

16 The new price was initially \$253 per acre-foot, and thereafter "equal to the charge  
17 or charges set by [Met's] Board of Directors pursuant to applicable law and  
18 regulation and generally applicable to the conveyance of water by [Met] on behalf  
19 of its member agencies." *Id.* § 5.2. By this term, Met charged San Diego the  
20 volumetric transportation rates it charged when it sold full-service water as of 2003  
21 – the System Access Rate, System Power Rate, and Water Stewardship Rate.

22 Tentative Statement, 3:14-20 (footnote omitted); *see also, id.* at 5:22-10:14.

23 The Tentative Statement omits the following agreed facts concerning the 1998 Exchange  
24 Agreement: The price Director Kennedy proposed was for wheeling, applicable when "Space Is  
25 Available" in the Colorado River Aqueduct. PTX-481 at MWD2010-00264719; Slater 1244:23-  
26 1245:19. The parties thereafter could not agree on a wheeling agreement and did not enter into  
27 one. *See* DTX-28. The parties instead entered into the 1998 Exchange Agreement, which among  
28 other things included no available space restriction. *Id.*; Stapleton 1576:23-1577:12. The price  
SDCWA was to pay MWD to deliver MWD water supplies in exchange for SDCWA's water was  
\$90 per acre-foot for 20 years, increasing by 1.55% each year; and then was \$80 per acre-foot,  
increasing by 1.44% each year. DTX-28, ¶¶ 5.1-5.2; Slater 1213:11-15. To bridge the parties'

1 disagreement about what the price should be, the State of California agreed to pay MWD \$235  
2 million to make up the difference. The State's payment of this amount was a condition precedent.  
3 DTX-28, ¶ 8.1; Slater 1166:13-1168:9; Kightlinger 1288:8-1290:4. Therefore, the consideration  
4 that MWD received pursuant to the 1998 Exchange Agreement was the price stated in the  
5 agreement's price provision, *plus* \$235 million. *Id.*

6 The Tentative Statement omits the following agreed facts concerning the 2003 Exchange  
7 Agreement: In consideration for SDCWA paying the higher price stated in the agreement's price  
8 provision, MWD assigned to SDCWA (1) the above-explained \$235 million from the State, and  
9 (2) 77,700 acre-feet of canal lining water per year for 110 years. Slater 1217:11-15; Stapleton  
10 1476:23-1477:18, 1643:7-23, 1644:17-23; DTX-50; DTX-130; DTX-221 at 14; DTX-884 at  
11 MWD2010-00190128.

12 Due to these omissions, key controverted issues of breach, damages, and MWD's  
13 affirmative defenses are not resolved and these rulings – which involve the 2003 Exchange  
14 Agreement's terms and benefits – are ambiguous because they do not account for the \$235 million  
15 consideration component of the 2003 Exchange Agreement, which was preceded by the \$235  
16 million consideration component of the 1998 Exchange Agreement, nor the canal lining  
17 consideration component of the 2003 Exchange Agreement.

18 For example, as to the estoppel defense, the Tentative Statement states: "Met could not  
19 have relied on San Diego's proposal of or agreement to this price term to conclude that its rate  
20 structure is lawful." Tentative Statement, 22:8-9. The Tentative Statement omits evidence of  
21 MWD's reliance by assigning to SDCWA the valuable consideration of \$235 million and 77,700  
22 acre-feet of canal lining water for 110 years. Slater 1216:15-1217:25. The canal lining water is  
23 potentially valued at over \$1.2 billion. Stapleton 1642:14-1643:16.

24 As to the consent defense, the Tentative Statement states:

25 San Diego did not accept the benefits of the contract without protest in the rate  
26 years at issue here. Again, each time Met sets unlawful conveyance rates, it  
27 breached its obligations. Perhaps San Diego accepted Met's performance in prior  
28 years, even after the expiration of the five year period; but San Diego did not accept  
Met's performance in the rate years at issue. Rather, it sued to challenge these  
breaches.

1 Tentative Statement, 21:3-8. The Tentative Statement omits evidence of SDCWA's acceptance of  
2 the benefits of the 77,700 acre-feet of canal lining water per year, including during each of the  
3 years 2011 through 2014 at issue here, without protest. Stapleton 1640:24-1645:8; Cushman  
4 1067:3-1068:17, 1069:19-25.

5 **G. The Tentative Statement Omits Or Misstates The Main Part Of Section 5.2's**  
6 **Third Sentence**

7 The Tentative Statement relies on the third sentence of the Exchange Agreement's Section  
8 5.2 in its rulings on breach and MWD's affirmative defenses. The Court finds that in this  
9 sentence, the parties agreed SDCWA could not challenge the rates comprising the price for the  
10 agreement's first five years (Tentative Statement, 6:20-10:14) and that this is evidence supporting  
11 the rulings on breach (*id.* at 11:11-18, 11:26-12:9), consent (*id.* at 20:11-13), estoppel (*id.* at 22:1-  
12 13, 22:22-23:7), illegality (*id.* at 23:16-19), and mistake of law (*id.* at 24:3-25:7). For example,  
13 the Tentative Statement states:

14 For five years, the parties precluded San Diego from challenging Met's  
15 interpretation of the law, whether or not that interpretation changed during that  
16 period. Thereafter, if San Diego disagreed it was free to bring a judicial challenge.

17 Tentative Statement, 24:23-25:2.

18 The controverted issues of breach and MWD's defenses are not resolved and the rulings  
19 are ambiguous due to the omission or misstatement of the main part of this sentence. The main  
20 part of the sentence is the only part of Section 5.2 that places limits on a lawsuit. It states:

21 For the term of this Agreement, neither SDCWA nor Metropolitan shall seek or  
22 support in any legislative, administrative or judicial forum, any change in the form,  
23 substance or interpretation of any applicable law or regulation (including the  
24 Administrative Code) in effect on the date of this Agreement and pertaining to the  
charge or charges set by Metropolitan's Board of Directors and generally  
applicable to the conveyance of water by Metropolitan on behalf of its member  
agencies;

PTX-65 at § 5.2.

25 The plain language is therefore that neither party shall seek nor support a *change* in  
26 applicable law or regulation then in effect, pertaining to MWD's conveyance charge or charges.  
27 *Id.* SDCWA's witnesses testified that this language prohibits a lawsuit seeking a *change* in the  
28

1 interpretation of applicable law then in effect. Slater 1238:8-1240:7; Stapleton, 1603:10-1606:16.

2 There is no prohibition on a lawsuit challenging rates under laws in effect in 2003.<sup>5</sup>

3 As Maureen Stapleton testified:

4 Q. You understood from reading this provision that San Diego was only restricted  
5 from seeking a change in the form, substance and interpretation of the then existing  
6 law; correct?

6 A. Laws or regulation. Yeah.

7 Q. That was in effect on the date of this agreement; correct?

7 A. Yes.

8 Q. And you understood that the change in form, substance or interpretation of existing  
9 law, that referred to – that that refers to what was in effect in 2003?

9 A. Yes.

10 Q. But San Diego's understanding in 2003, that Met's rates were illegal in 2003 –  
11 Are you with me so far?

11 A. I am.

12 Q. -- was based on the then existing law in 2003, necessarily, correct?

12 A. Yes.

[Sustained objection]

13 Q. BY MR. QUINN: San Diego could challenge Met's rates – it was San Diego's  
14 view that the rates were unlawful under the then existing law of 2003?

[Overruled objection]

15 Q. BY MR. QUINN: Correct?

15 A. Correct.

16 Q. And you're only prohibited from seeking to change the form, substance or  
17 interpretation of the then existing law; that's what the proviso governs; correct?

17 A. Correct.

18 Stapleton 1603:24-1605:18.

19 The current actions are a challenge to MWD's rates under laws in effect in 2003 (other  
20 than Prop 26, which was passed in November 2010). The Tentative Statement omits or misstates  
21 Section 5.2's plain language, which did not prohibit SDCWA at any time, including between 2003  
22 and 2008, from filing a rate challenge like the current action. Stapleton 1604:24-1605:14.

23  
24  
25  
26 <sup>5</sup> There are two provisos that follow this main part. While the parties disagree about the  
27 meaning of the second proviso, it is plain that it addresses the period *after* the first five years. The  
28 second proviso does not contain any prohibition concerning the first five years.

1                   **H.     The Tentative Statement Omits Facts Supporting The Defense Of Estoppel**

2                   The Tentative Statement’s ruling on estoppel omits evidence supporting the affirmative  
3 defense. In a footnote, the Tentative Statement states that “Met’s arguments conceivably address  
4 the first two elements [of estoppel], but not the rest.” Tentative Statement, 21 n. 32. MWD  
5 addressed all elements of estoppel, including MWD’s ignorance of the true facts and its reliance  
6 on SDCWA’s conduct. MWD’s Corrected Closing Brief, 30:16-31:4.

7                   The evidence was that at the time MWD entered into the 2003 Exchange Agreement, it  
8 was ignorant of the true facts, *i.e.*, it believed the rates were lawful and that SDCWA had accepted  
9 the rate structure (Kightlinger 1316:3-18, 1304:19-1306:8; Slater 1192:13-17, 1231:16-19;  
10 Stapleton 1641:16-1645:8; DTX-50); and MWD relied on SDCWA’s conduct by: (i) approving  
11 and executing the Exchange Agreement; (ii) assigning to SDCWA \$235 million and the canal  
12 lining water worth over \$1 billion; (iii) adopting rates based on the rate structure and findings  
13 approved by SDCWA in 2002 and re-adopting them thereafter; (iv) delivering exchange water and  
14 invoicing SDCWA in accordance with the initial price and subsequent prices based on the same  
15 structure; (v) charging members based on the rate structure; and (vi) setting budgets and revenue  
16 requirements based, in part, on the payments anticipated from SDCWA (Kightlinger 1306:15-  
17 1307:2, 1316:3-18; 1318:3-24; Skillman 1798:17-1799:11).

18                   Neither of these elements is addressed in the Tentative Statement. Due to the omitted  
19 evidence, the controverted issue of estoppel is not resolved and the Tentative Statement is  
20 ambiguous.

21                   **I.     The Tentative Statement Fails To Address The Defense Of Mistake As To**  
22                   **Each Individual Rate**

23                   The Tentative Statement’s ruling on the affirmative defense of mistake of law only  
24 concerns the rate structure as a whole. Tentative Statement, 24:14-25:7. It omits evidence of  
25 mistake concerning the rates individually – the System Access Rate, System Power Rate, or Water  
26 Stewardship Rate. A mistake as to any of these three rates comprising the Exchange Agreement  
27 price can establish mistake of law.  
28

1           There is no evidence that SDCWA believed either the System Power Rate or the Water  
2 Stewardship Rate were unlawful in 2003. *See* DTX-794; Cushman 1038:17-1039:25; Stapleton  
3 1459:13-1463:16. SDCWA sent a letter in 2003 objecting to the System Access Rate (although  
4 not on the grounds it was unlawful), but not objecting to either the System Power Rate or the  
5 Water Stewardship Rate. *Id.* SDCWA instead praised the System Power Rate in 2003. DTX-  
6 794, MWDRECORD2012\_007122; Cushman 1038:4-1039:25; Stapleton 1457:8-1460:13. The  
7 evidence that MWD believed each was lawful was not disputed. Kightlinger 1316:3-18.

8           The controverted issue of mistake of law is thus not resolved in the Tentative Statement  
9 and the Tentative Statement is ambiguous due to this omission.

10           **J.       The Preferential Rights Ruling Exceeds The Scope Of The Requested**  
11           **Declaration And Thus Violates MWD’s Due Process Rights**

12           In its declaratory relief cause of action concerning preferential rights, SDCWA sought a  
13 declaration as to “the Water Authority’s payments to Metropolitan for transportation of IID and  
14 Canal Lining Water,” *i.e.* payments under the Exchange Agreement. SDCWA’s Third Amended  
15 Complaint, ¶ 115. The Tentative Statement’s ruling on preferential rights not only addresses  
16 SDCWA’s payments under the Exchange Agreement as SDCWA requested in its complaint, but  
17 also payments in a wheeling transaction. Tentative Statement, 29:8-11. SDCWA did not plead,  
18 and MWD was not on notice that it should seek discovery concerning and defend at trial, a  
19 declaratory relief request concerning payments in a wheeling transaction.<sup>6</sup>

20           This ruling exceeds the scope of the requested declaration. *In re Wren*, 48 Cal. 2d 159,  
21 163 (1957) (any judgment that goes beyond the issues litigated is void insofar as it exceeds those  
22 issues); *Baar v. Smith*, 201 Cal. 87, 101 (1927) (courts do not have “power to decide questions  
23 except such as are presented by the parties in their pleadings . . . anything beyond is void”); *C.J.A.*

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24  
25           <sup>6</sup> As the Tentative Statement notes, on the preferential rights cause of action MWD’s  
26 Closing Brief addressed only the Exchange Agreement, not wheeling agreements. Tentative  
27 Statement, 25:27 n. 42. MWD’s motion for summary adjudication on this cause of action also  
28 addressed only the Exchange Agreement, since that is the scope of the pleading.

1 *Corp. v. Trans-Action Fin. Corp.*, 86 Cal. App. 4th 664, 673 (2001) (“a judgment outside the  
2 issues is not a mere irregularity; it is extra judicial and invalid”); *Jew Fun Him v. Occidental Life*  
3 *Ins. Co.*, 88 Cal. App. 2d 246, 250 (1948) (the purpose of a judgment is to definitely determine the  
4 claims in conformity with the pleadings filed).

5 **K. The Preferential Rights Ruling Omits Evidence Distinguishing The Exchange**  
6 **Agreement From Wheeling Transactions, And Showing That Exchange**  
7 **Agreement Payments Are For “Purchase Of Water”**

8 The Tentative Statement states “the Exchange Agreement differs in some respects from a  
9 wheeling contract” and notes

10 Met says there are two differences. Exchange Water has to be delivered regardless  
11 of capacity whereas wheeled water is made available when capacity is available;  
12 secondly, Met makes Exchange Water available in monthly installments even if the  
same amount of water is not, on a monthly basis, provided to Met (the sums  
equalize out over a year period).

13 Tentative Statement, 28:19-21 and n. 46.

14 MWD presented evidence of five differences between the Exchange Agreement transaction  
15 and wheeling. MWD’s Corrected Closing Brief, 38:15-39:9. MWD also presented SDCWA’s  
16 testimony that the Exchange Agreement was “radically different than a wheeling agreement,” and  
17 the Exchange Agreement is “like a trade-in” and indistinguishable from the purchase of water.  
18 Stapleton 1576:23-1578:23; Cushman 1094:13-1095:19. The preferential rights ruling thus omits  
19 evidence distinguishing the exchange from wheeling, and supporting the agreement payments as  
20 for “purchase of water.” The controverted issue of preferential rights is not resolved and the  
21 Tentative Statement is ambiguous due to this omission.

22 **DATED: August 14, 2015**

23 QUINN EMANUEL URQUHART &  
24 SULLIVAN, LLP

25 By           /s/ Eric J. Emanuel          

26 Eric J. Emanuel  
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**PROOF OF SERVICE**

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 August 14, 2015, I served true copies of the following document(s) described as

**METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA’S OBJECTIONS TO PHASE II TENTATIVE STATEMENT AND PROPOSED STATEMENT OF DECISION**

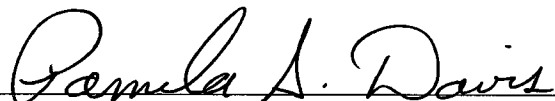
on the interested parties in this action as follows:

**SEE ATTACHED LIST**

**BY FILE & SERVEXPRESS:** 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 August 14, 2015, at Los Angeles, California.

  
Pamela S. Davis



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