

1 ALLEN MATKINS LECK GAMBLE  
MALLORY & NATSIS LLP  
2 DAVID L. OSIAS (BAR NO. 091287)  
MARK J. HATTAM (BAR NO. 173667)  
3 501 West Broadway, 15th Floor  
San Diego, California 92101-3541  
4 Telephone: (619) 233-1155  
Facsimile: (619) 233-1158  
5 E-Mail: dosias@allenmatkins.com  
mhattam@allenmatkins.com

6 Attorneys for Defendant  
7 IMPERIAL IRRIGATION DISTRICT

RECEIVED

AUG 09 2011

GEN'L COUNSEL

NO FILING FEE REQUIRED  
PURSUANT TO GOVERNMENT  
CODE § 6103

10 SUPERIOR COURT OF CALIFORNIA

11 COUNTY OF SAN FRANCISCO

12 SAN DIEGO COUNTY WATER AUTHORITY,

13 Plaintiff,

14 v.

15 METROPOLITAN WATER DISTRICT OF  
SOUTHERN CALIFORNIA; et al.,

16 Defendants.

Case No. CPF-10-510830

ASSIGNED FOR ALL PURPOSES TO  
JUDGE RICHARD A. KRAMER  
DEPARTMENT 304  
(COMPLEX CASE)

Case Filed June 11, 2010

**RESPONSIVE TRIAL BRIEF BY  
IMPERIAL IRRIGATION DISTRICT AS  
TO ISSUES OF: (1) STANDING; AND  
(2) PROCEDURE AS TO WATER CODE  
SECTIONS 1810 *ET SEQ.***

DATE: August 30, 2011  
TIME: 1:30 p.m.  
DEPT: 304

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Page**

I.	INTRODUCTION.....	1
II.	IID HAS STANDING TO BE IN THIS VALIDATION CASE.....	3
A.	The Validation Law Regarding Standing.....	3
B.	Why IID Is An "Interested Person" Under The Validation Law.....	6
1.	IID, As A Water Transferor, Has An Interest In Fair Access To MWD's Conveyance System.....	7
(a)	MWD Does Not Dispute That Its System Access Rate Applies To Third Parties Such As IID, Or That It Controls Water Conveyance Access To Urban Southern California.....	7
(b)	Given MWD's System Access Rate, Is There A Reasonable Chance IID Will Be Charged? Yes.....	8
2.	IID's Contract With SDCWA Gives It An Interest In MWD's Wheeling Rate.....	11
3.	MWD Is Well Aware That IID Is An Interested Person.....	13
(a)	IID Has Tenaciously Contested MWD's Prior Wheeling Rates, With MWD Acknowledging IID's Interest.....	13
(b)	MWD Knew That IID's Contract With SDCWA Stated That IID Had A Right To Participate In Any Litigation Over MWD's Transportation Rates And Is Now Estopped To Claim That IID Has No Standing.....	15
III.	THE MWD RATE IS UNLAWFUL UNDER THE WHEELING LAW, AS PROPERLY STATED IN IID'S ANSWER.....	16
IV.	CONCLUSION.....	18

TABLE OF AUTHORITIES

		<u>Page(s)</u>
1		
2		
3		
4	<u>Cases</u>	
5	<i>Anglo-California Trust Co. v. Oakland Railways</i> (1924 ) 193 Cal.451.....	16
6	<i>Bonander v. Town of Tiburon</i> (2009) 46 Cal. 4th 646.....	3, 4
7		
8	<i>Butler v. Woodburn</i> (1942) 19 Cal.2d 420.....	16
9		
10	<i>Card v. Community Redevelopment Agency</i> (1976) 61 Cal.App.3d 570.....	4, 5
11	<i>Citizens Against Forced Annexation v. County of Santa Clara</i> (1984) 153 Cal.App.3d 89.....	4, 5
12		
13	<i>Common Cause v. Board of Supervisors</i> (1989) 49 Cal.3d 432.....	5
14	<i>County of Imperial v. Superior Court</i> (2007) 152 Cal.App.4th 13.....	9, 12
15	<i>Embarcadero Mun. Improvement Dist. v. County of Santa Barbara</i> (2001) 88 Cal.App.4th 781.....	16
16		
17	<i>Estate of Cates</i> (1971) 16 Cal.App.3d 1.....	16
18	<i>Meaney v. Sacramento Housing &amp; Redevelopment Agency</i> (1993) 13 Cal.App.4th 566.....	4
19		
20	<i>Metropolitan Water Dist. v. Imperial Irrigation Dist.</i> (2000) 80 Cal.App.4th 1403.....	6, 14
21	<i>Millbrae School District v. Superior Court</i> (1989) 209 Cal.App.3d 1494.....	16
22		
23	<i>Moorpark Unified School Dist. v. Superior Court</i> (1990) 223 Cal.App.3d 954.....	17
24	<i>Regus v. City of Baldwin Park</i> (1977) 70 Cal.App.3d 968.....	5, 6
25		
26	<i>San Francisco Taxpayers Assn. v. Board of Supervisors</i> (1992) 2 Cal.4th 571.....	17
27	<i>Save the Plastic Bag Coalition v. City of Manhattan Beach</i> (2011) 2011 Cal. LEXIS 6866 .....	5
28		

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Page(s)**

*Spector v. Superior Court*  
(1961) 55 Cal.2d 839 ..... 6

*Torres v. City of Yorba Linda*  
(1993) 13 Cal.App.4th 1035 ..... 4, 5, 8

**Statutes**

Code of Civil Procedure Section 431.30(c) ..... 17

Code of Civil Procedure Section 861 ..... 3

Code of Civil Procedure Section 861.1 ..... 3, 17

Code of Civil Procedure Section 862 ..... 3

Code of Civil Procedure Section 863 ..... 3, 4, 17

Code of Civil Procedure Section 870 ..... 3

Code of Civil Procedure Section 870(a) ..... 6

Code of Civil Procedure Sections 860 - 870.5 ..... 16

Code of Civil Procedure Sections 860 *et seq.* ..... 2, 3, 6

**Other Authorities**

Water Code Section 12563 ..... 12

Water Code Section 12564 ..... 12

Water Code Section 1813 ..... 14

Water Code Sections 1810 *et seq.* ..... passim

1                    **RESPONSIVE TRIAL BRIEF BY IMPERIAL IRRIGATION DISTRICT**

2  
3                    **I. INTRODUCTION**

4                    The Court has bifurcated this case to hear two issues first: (1) do the Imperial Irrigation  
5 District ("IID") and Utility Consumers' Action Network ("UCAN") have standing to be in this  
6 case?; and (2) is IID's assertion of a violation of Water Code sections 1810 *et seq.* (the "Wheeling  
7 Law")<sup>1</sup> stated in its answer procedurally allowed, or must IID have filed a cross-complaint?

8                    The Metropolitan Water District of Southern California ("MWD") and its supporting  
9 members have filed an opening trial brief which contends that IID and UCAN should be barred  
10 from this case, and that IID's allegation of invalidity based on the Wheeling Law is not allowed.  
11 In this brief IID explains why it is a proper party to this case, and why its assertion of the  
12 Wheeling Law violation was procedurally correct.<sup>2</sup>

13                    IID's central points regarding standing, articulated in detail below, are these:

- 14                    1.        This is a validation case, and IID by law will be bound by the result. MWD's  
15                    attempt to disenfranchise IID from a case where the result will be binding on IID is  
16                    not in accord with established legal principles.
- 17                    2.        MWD passed water rates which state that they apply to all third parties who want to  
18                    use MWD's water conveyance system. The legality of those water rates are the  
19                    issue in this lawsuit.
- 20                    3.        IID is a third party which owns a large water right to Colorado River water.
- 21                    4.        Historically, urban Southern California has had water shortfalls and has looked  
22                    outside its boundaries for water. One of the places it has looked is to IID's  
23                    Colorado River water right.

24  
25  
26  
27 <sup>1</sup> "Wheeling" being the conveyance of a third party's water through a public water transport  
system.

28 <sup>2</sup> UCAN's standing is addressed in that entity's brief.

- 1 5. IID, under the guidance of the State Water Resources Control Board, has been  
2 willing to perform conserved water transfers with urban Southern California,  
3 including with MWD itself and with MWD member agency San Diego County  
4 Water Authority ("SDCWA").
- 5 6. One of MWD's facilities is the Colorado River Aqueduct ("CRA"), which runs  
6 from the Colorado River to metropolitan Southern California. For water to go from  
7 IID's service area to urban Southern California, it must travel through the CRA.  
8 Thus, MWD owns the exclusive means of water transport into urban Southern  
9 California.
- 10 7. Therefore, if IID desires to engage in water transfers to urban Southern California,  
11 it must send its water through MWD's CRA (or work out some other consensual  
12 agreement with MWD, such as a water exchange agreement). IID is thus subject to  
13 the rates MWD sets for access to its system in order for IID's "product" (conserved  
14 water) to reach any willing "buyer" in urban Southern California. IID therefore has  
15 standing to be in a lawsuit which determines the legality of MWD's rates for this  
16 transport.
- 17 8. IID has a water transfer agreement with SDCWA in which the price for conserved  
18 water, and contract length, are tied to what MWD charges SDCWA to deliver the  
19 water. MWD has set a rate that facially applies to the IID/SDCWA transfer  
20 agreement. IID's contract gives it standing to make sure that MWD's rates, which  
21 directly affect that contract, are lawful. MWD has always known about IID's stake  
22 in that contract, was aware that the contract said that IID was a real party in interest  
23 in any dispute about MWD's rate, and MWD is now estopped to contest IID's  
24 standing.

25 In regards to the Wheeling Law procedural issue, IID fully followed the requirements of  
26 Code of Civil Procedure ("CCP") sections 860 *et seq.* (the "Validation Law"). It is allowed, by  
27 law, to contest a public agency action by way of an answer. The answer can assert why the  
28 agency action at issue in the case is unlawful. Violation of the Wheeling Law is the reason.

1 The Court should conclude that IID has standing and that IID's assertion of a Wheeling  
2 Law violation is properly stated by its Answer.

3 **II. IID HAS STANDING TO BE IN THIS VALIDATION CASE**

4 The operative pleading by SDCWA is both a petition for writ of mandate and a complaint.  
5 It states a mandate claim as well as civil claims for declaratory relief and validation.<sup>3</sup> IID's  
6 Answer<sup>4</sup> makes clear that IID is responding only to the validation cause of action (*see* IID Answer  
7 ¶¶ 36-66, where IID does not address the non-validation causes of action).

8 Therefore, IID is presently in this case solely as a responding party to a validation  
9 complaint. In *that* context its standing must be judged.

10 **A. The Validation Law Regarding Standing**

11 The issue of standing in validation cases is repeatedly stated in the context of "interested  
12 persons." *See*, for example, CCP sections 861 ("Jurisdiction of all interested parties"); section  
13 861.1 ("The summons shall be directed to 'all persons interested in the matter of'"); section 862  
14 ("Any party interested may"); and section 863 ("any interested person").

15 Once a validation case is completed, the judgment creates a permanent injunction against  
16 anyone ever again raising the same issues, and is binding on all persons. Code of Civil Procedure  
17 section 870.

18 There are, as best as IID can determine, six relatively modern cases addressing in some  
19 manner standing to be an "interested person" under the validation statutes. Not a single one of  
20 them supports MWD's position that IID must be excluded from this litigation:

- 21 • *Bonander v. Town of Tiburon* (2009) 46 Cal. 4th 646: This recent California  
22 Supreme Court decision pertained to property owners challenging an  
23 assessment. *Id.* at pp. 648-649. The Supreme Court noted the very broad  
24 nature of validation actions, including the fact that under Code of Civil  
25 Procedure section 870 a judgment is "binding and conclusive . . . against the  
26

27 <sup>3</sup> IID Notice of Lodgment of Trial Exhibits ("NOL"), Exhibit A.

28 <sup>4</sup> IID NOL, Exhibit B.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

agency and against all other persons . . . ." *Id.* at p. 656. (Italics in original.)  
The Supreme Court then pointed out that the phrase "any interested person" in  
CCP section 863 "might of course include a party contesting the matter in  
question." *Id.*

- *Meaney v. Sacramento Housing & Redevelopment Agency* (1993)  
13 Cal.App.4th 566: In denying a lack of standing claim, the Court found that  
school districts were "interested persons" because of a statute, and because  
their "future tax base may be limited by implementation of the Courthouse  
Agreement." *Id.* at p. 583.
- *Torres v. City of Yorba Linda* (1993) 13 Cal.App.4th 1035: Here, plaintiffs  
were not residents of the city of Yorba Linda, did not pay taxes there, and  
were not "otherwise beneficially interested in the area covered by the  
redevelopment plan." *Id.* at p. 1043. Though plaintiffs claimed they  
theoretically might someday move to Yorba Linda, the Court noted that these  
were serial reverse validation plaintiffs who were apparently criss-crossing the  
State to file similar lawsuits. *Id.* Given such egregious facts, they had no  
standing. *Id.* at pp. 1043-1044. Also, the redevelopment agency would not  
affect residents outside its area, since it was self-funding. *Id.* at p. 1044.
- *Citizens Against Forced Annexation v. County of Santa Clara* (1984)  
153 Cal.App.3d 89: The standing of an association which represented local  
residents was challenged. *Id.* at p. 94. The Court of Appeal stated the  
association had standing due to "the broad language of section 863 of the  
Code of Civil Procedure . . . and the nature of a validation action." *Id.* at  
p. 96.
- *Card v. Community Redevelopment Agency* (1976) 61 Cal.App.3d 570: The  
Court of Appeal affirmed the standing of plaintiffs as interested persons,  
because each was "a citizen, resident and taxpayer of the city and a person

1 interested in the matter of the amendments to the redevelopment plans for the  
2 Monterey Hills Project No. 1." *Id.* at pp. 574-575, fn. 6.

3 • *Regus v. City of Baldwin Park* (1977) 70 Cal.App.3d 968: Plaintiffs were  
4 residents and taxpayers of a city challenging a redevelopment project in an  
5 area where none of the plaintiffs were living or paying taxes. *Id.* at p. 971.  
6 The Court of Appeal said that standing was not limited to those in the  
7 redevelopment area, and that plaintiffs had standing because the agencies to  
8 whom they did pay taxes would be funding the redevelopment agency, thus  
9 giving them a sufficient interest to participate in the litigation. *Id.* at p. 972.

10 Thus, the only validation case pointed out by MWD in which standing was denied -- the  
11 *Torres* case -- was when there were plaintiffs serially suing everywhere and claiming they might  
12 move to the sued locale someday. Though MWD also cites to the *Citizens Against Forced*  
13 *Annexation* case (MWD Brief, p.3), that case said that even voter registration was enough for  
14 standing in a validation case. *Id.* at p. 95. The Court in that case also said that just an interest in  
15 annexation procedures was enough for standing (*Id.* at p. 98), and ruled for standing (*Id.* at p. 96).  
16 MWD has therefore taken the sole case it could find where validation standing was denied  
17 (*Torres*), a case with extreme facts, and then tries to use that case as the template for standing.

18 MWD ignores the real reason for standing requirements. The California Supreme Court  
19 recently restated the purpose of standing requirements:

20 "The purpose of a standing requirement is to ensure that the courts will  
21 decide only actual controversies between parties with sufficient interest  
in the subject matter of the case to press their case with vigor."

22 *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 2011 Cal. LEXIS 6866, at 24  
23 (quoting *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 439). (Emphasis added.)

24 IID has already, and will continue to, press its case here with vigor, for the reasons  
25 described below. Validation case law makes clear that this dedication to litigate is all that is  
26 needed for "interested party" status:

27 As taxpayers . . . plaintiffs have a financial interest in the outcome  
28 of this [validation] proceeding, in that the tax increment financing of  
the Project will divert tax revenues from the taxing agencies . . . .

1                    Such a financial interest is likely to motivate plaintiffs to prosecute  
2                    the action vigorously and provides sufficient basis to give them  
3                    standing.

3 *Regus v. City of Baldwin Park* (1977) 70 Cal.App.3d 968, 972. (Emphasis added.)

4            Further, the Court should be aware of the draconian nature of validation. If a validatable  
5 public agency action is validated by the courts, per Code of Civil Procedure section 870(a) that  
6 judgment is "forever binding and conclusive, as to all matters therein adjudicated or which at that  
7 time could have been adjudicated, against the agency and against all other persons ...." Therefore,  
8 if MWD's rates are properly validated, IID can be bound by the result.

9            Given such rule, persons such as IID who do have an interest in the outcome of the case  
10 should not be disenfranchised, as MWD seeks here. MWD wants IID bound by the result in this  
11 case, but without allowing IID the right to participate. This violates fundamental due process  
12 rights, since if a party is to be bound by a judgment it has an absolute right to participate in the  
13 case:

14                    It is a cardinal principle of our jurisprudence that a party should not  
15                    be bound or concluded by a judgment unless he has had his day in  
16                    court.

16 *Spector v. Superior Court* (1961) 55 Cal.2d 839, 843.

17            MWD would have this Court act in clear violation of this cardinal principle articulated by  
18 the California Supreme Court. The Court must decline that invitation to error.

19            **B. Why IID Is An "Interested Person" Under The Validation Law**

20            IID is legitimately "interested" in MWD's rates. In fact, IID has been so "interested" in the  
21 rates MWD charges for access to its water conveyance system that it took MWD's rates all the  
22 way through a prior validation trial court proceeding and an appeal (*Metropolitan Water Dist. v.*  
23 *Imperial Irrigation Dist.* (2000) 80 Cal.App.4th 1403) before MWD dismissed that case. IID is  
24 here once again fighting vigorously to protect its interests.

25            In this section of its brief, IID explains to the Court the two independent reasons it is an  
26 interested party here: (1) its status as a large Colorado River water right holder with a history of  
27 conserved water transfers to urban Southern California; and (2) its transfer agreement with  
28 SDCWA.

1                   1.     IID, As A Water Transferor, Has An Interest In Fair Access To MWD's  
2                                    Conveyance System

3                   MWD's Brief to this Court ignores the facts as to what its rate does, who IID is, what IID  
4 has been guided to do by the State, what IID has done in the past, and MWD's physical monopoly  
5 on water transportation into urban Southern California. All of this demonstrates IID's real interest  
6 in this proceeding.

7                                   (a)     MWD Does Not Dispute That Its System Access Rate Applies To  
8    Third Parties Such As IID, Or That It Controls Water Conveyance  
9    Access To Urban Southern California

10                   MWD claims that IID does not currently pay its rates. Brief, p.5. However, MWD does  
11 not dispute that if IID wants access to the MWD conveyance system, it would have to pay this  
12 new MWD rate.

13                   SDCWA's Complaint alleges that MWD passed a "System Access Rate" which includes  
14 MWD's costs for the State Water Project (just as with earlier IID contested transportation rates set  
15 by MWD; *supra*). Complaint, ¶ 21(a). What is this System Access Rate? It is a wheeling rate,  
16 just given a different name.<sup>5</sup> Attached as Exhibit "B" to the SDCWA Complaint is "background  
17 material Metropolitan staff prepared for the meeting at which Metropolitan's Board adopted the  
18 rates and charges challenged in this action . . . ." Complaint, p.6(17-20); IID NOL, Exhibit A. In  
19 these materials, the Cost of Service Study which formed the basis for the rates is found at pages 25  
20 *et seq.* of Exhibit "B" to the Complaint. In Exhibit "B" at page 50 is the MWD Cost of Service  
21 Study's description of what the "System Access Rate" is:

22                                   The SAR is a volumetric system-wide rate levied on each acre-foot  
23 of water that moves through the MWD system. *All* system users  
24 (member agency or third party) pay the SAR to use Metropolitan's  
conveyance and distribution system.

25 (Emphasis added.)

27 \_\_\_\_\_  
28 <sup>5</sup> The Wheeling Law at Water Code Sections 1810, *et seq.*, governs compelled access to public  
agency water conveyance systems as to unused capacity.



1 WR 88-20 was the promotion of conserved water transfers by IID. The SWRCB found that  
2 California would benefit from conserved water transfers by IID. However, the SWRCB also  
3 found that one of the main impediments for IID was funding the water conservation that would  
4 create the water to be transferred. Likely sources of funding for IID conservation measures  
5 identified by the SWRCB were urban areas in need of water. The SWRCB found that the "need  
6 for substantial additional water supplies in California and the prospects for substantial water  
7 conservation in the IID have been well established." *Id.*, p. 44. The SWRCB also found that  
8 "conservation of 367,900 acre-feet per annum . . . is a reasonable long-term goal which will assist  
9 in meeting future water demands [in Southern California]." *Id.*

10 The SWRCB instructed IID to complete "an executed agreement with a separate entity  
11 willing to finance water conservation measures in Imperial Irrigation District," or take other  
12 measures which would achieve equally beneficial results. *Id.*, p. 45. The SWRCB retained  
13 "jurisdiction to review implementation of the initial plan and future water conservation measures."  
14 *Id.*, p. 44. Pursuant to this mandate, IID entered into a 1988 conserved water transfer agreement  
15 with MWD for approximately 100,000 acre-feet of water per year. The water transfers with  
16 SDCWA, CVWD, and MWD that are part of the QSA and Related Agreements<sup>7</sup>, as approved by  
17 the SWRCB (IID NOL, Exhibit G), satisfy the long-term SWRCB goals for IID. The SWRCB  
18 acknowledged this in its Revised Order WRO 2002-013 at page 81: "IID's conservation and  
19 transfer of 230,000 to 300,000 afa will be in furtherance of the SWRCB's directive to IID,  
20 contained in Decision 1600 and Order WR 88-20, to evaluate, secure funding for, and implement  
21 potential conservation measures." IID NOL, Exhibit G.

22 However, the QSA water transfers approved by the SWRCB were declared invalid by the  
23 Sacramento Superior Court. IID NOL, Exhibits H and I. Judge Candee ruled all the water  
24 transfer contracts before him to be void, based on what he found to be an unconstitutional promise  
25

26  
27 <sup>7</sup> The Third District Court of Appeal in *County of Imperial v. Superior Court* (2007)  
28 152 Cal.App.4th 13 has a very useful summary of the QSA and related agreements ("QSA and  
Related Agreements") and their history on pages 19-21 of the decision. A courtesy copy of  
that decision is attached hereto as Exhibit "A."

1 by the State of California related to contingent mitigation funding. IID NOL, Exhibit H, pp. 44-  
2 46. IID, MWD, the State, and other agencies have appealed the ruling (IID NOL, Exhibits J, K  
3 and L), and the case is before the Third District Court of Appeal (which stayed the judgment  
4 pending review; IID NOL, Exhibit M). Therefore, there are two possibilities: (1) the trial court's  
5 decision is upheld, and the QSA water transfers are unconstitutional; or (b) the trial court's  
6 decision is reversed, and the rest of the case is tried. IID has an interest in access to MWD's  
7 conveyance system in either case.

8 In regards to the QSA water transfers, MWD's brief claims that IID is involved in a "First  
9 Level of Speculation" because, "The Court of Appeal would have to invalidate the IID-SDCWA  
10 agreement" for IID to have an interest in this case (because there would be no QSA transfers  
11 anymore). MWD Trial Brief, p.12. MWD has it totally backwards; *MWD* is the party  
12 speculating. *There is already a judgment invalidating the water transfers.* IID NOL, Exhibit I.  
13 Thus, absent *reversal* by the Court of Appeal, the QSA water transfers are invalid, and IID will be  
14 in the position it was in before they existed -- under the SWRCB's goal for IID to find willing  
15 water transferees in Southern California. IID cannot get its water to those transferees without  
16 access to MWD's CRA.

17 Thus, for MWD to come before this Court knowing full well that the QSA water transfers  
18 were voided (subject to appellate review) and yet still argue that IID is engaged in wild  
19 speculation that MWD's rates may affect IID is disingenuous. MWD knows precisely what the  
20 situation is with the QSA water transfers, since it is a party to that case. IID NOL, Exhibit K. The  
21 Sacramento Superior Court's decision, if not reversed, will result in IID again looking for  
22 conserved water transferees in MWD's region to satisfy SWRCB concerns. That market, the very  
23 market for water which the SWRCB directed IID to look to, is endangered by MWD's conveyance  
24 monopoly.<sup>8</sup>

25  
26 <sup>8</sup> MWD tosses in a gratuitous argument that the state Constitution bars IID water transfers into  
27 MWD's service area without its consent. MWD Trial Brief, p.11. This argument is nonsense,  
28 especially because this case is a rate challenge, not a case challenging IID's right to perform a  
particular transfer. MWD also misapplies the Constitutional provision, but that is legal  
briefing for another case, not this one.

1 Further compounding its error, MWD bases its contractual argument that IID cannot  
2 perform current water transfers, made on pages 9-11 of its Brief, on a contract voided by the  
3 Sacramento Superior Court, the MWD-IID Agreement. Remarkably, MWD does not even inform  
4 this Court that the contract it is arguing from was found to be void. (This contract is listed as  
5 "Contract F" on page 13 of the Sacramento Superior Court's decision. IID NOL, Exhibit H. It  
6 was found to be invalid. See pp. 44-46 of that decision (*Id.*), and the Judgment thereon. IID NOL,  
7 Exhibit I.)

8 Should the Court of Appeal reverse the Superior Court, IID still has a decided interest in  
9 MWD's rates. MWD itself admits that under the MWD-IID Agreement, IID can make water  
10 transfers in 2023. MWD Trial Brief, p. 9. That is 12 years from now. Major water transfers take  
11 many years to negotiate and plan for. For instance, the initial Memorandum of Understanding  
12 between IID and SDCWA which started the long road to the IID-SDCWA QSA water transfer was  
13 signed in 1995. IID NOL, Exhibit N. However, the water did not start to be transferred until  
14 2003, an eight-year span. MWD Trial Exhibit 2, pp. 120-121. As the Court is no doubt aware,  
15 such projects must go through complicated negotiations, environmental reviews, and  
16 governmental approvals and permits which can take many years. Thus, even assuming a Court of  
17 Appeal reversal, IID can start working on further water transfers for upcoming years now. The  
18 price of water transportation is obviously a key component for any negotiated transfer of  
19 conserved water.

20 2. IID's Contract With SDCWA Gives It An Interest In MWD's Wheeling  
21 Rate

22 In addition to IID's existing and future interest in conserved water transfers to urban  
23 Southern California, IID also has a direct interest in MWD's wheeling rate due to its existing water  
24 transfer agreement with SDCWA.<sup>9</sup> MWD argues that IID "is not even indirectly affected by  
25 Metropolitan's rates" until the year 3034 under this contract. MWD Trial Brief, p.8. That is not  
26 correct.

27 \_\_\_\_\_  
28 <sup>9</sup> A contract which, like the MWD-IID Agreement, was voided by the Sacramento Superior  
Court and is awaiting appellate review. IID Exhibits H to M.

1 In paragraph 17 of the Complaint, SDCWA pleads that it has a contract with IID to  
2 purchase conserved water. That contract was judicially recognized in the case *County of Imperial*  
3 *v. Superior Court* (2007) 152 Cal.App.4th 13, at page 20. The Court of Appeal also noted that the  
4 IID-SDCWA contract was a key element of the overall Quantification Settlement Agreement  
5 ("QSA") regarding disputes over Colorado River water. *Id.* at p. 21. The Legislature has also  
6 recognized the IID/SDCWA water transfer agreement. *See*, for example, Water Code sections  
7 12563 and 12564.

8 So what is the connection of this contract with MWD's rates? The term of IID's water  
9 transfer agreement with SDCWA is driven by MWD's rate for transporting water, as is the cost for  
10 water in later years. Here is a basic summary:

- 11 • The term of the IID-SDCWA conserved water transfer agreement is 45 years,  
12 with 2003 as the first year. MWD Trial Exhibit 2, section 4.1(a), p. 72.
- 13 • The term of the agreement can be reduced to 35 years by SDCWA, depending  
14 on whether MWD's transportation rate reaches a certain threshold (125% of  
15 the "Base Wheeling Rate"). *Id.*, section 4.1(c), pp. 126-127. A decision by  
16 SDCWA to reduce the term of the transfer agreement with IID must be made  
17 in the first 15 years of the contract, i.e., the period we are now in with MWD's  
18 present wheeling rates. *Id.* The 15-year period in which SDCWA must make  
19 this decision started in 2003 and ends in six years. *Id.*
- 20 • IID desires the full 45-year term of the agreement.
- 21 • MWD's transportation rate can also potentially reduce the amount of money  
22 IID receives from SDCWA during years 33 to 45 of the contract if the  
23 agreement is not terminated by SDCWA. *Id.*, section 5.2(k), p. 152.

24 Therefore, MWD's transportation rate can presently reduce the duration of IID's water  
25 transfer agreement with SDCWA (45 years potentially reduced to 35), and also potentially affect  
26 IID's price with SDCWA in certain future years. A 45-year term is approximately 30% more than  
27 a 35-year term. Thus, MWD's claim that only the rates it starts charging in the year 2034 can  
28 potentially affect the IID-SDCWA contract is therefore a complete misrepresentation. SDCWA

1 must make its termination decision based on the present transportation rate during the 15-year  
2 period it is now in, not decades from now.

3 MWD argues that the Fifth Amendment signed by IID and SDCWA to their water transfer  
4 agreement somehow changed everything, but this is not the case. Nothing in that amendment  
5 deleted or altered section 4.1(c), which is the contract section that allows SDCWA its early  
6 termination right tied to MWD's wheeling rate.

7 3. MWD Is Well Aware That IID Is An Interested Person

8 MWD knows full well that IID has a legitimate interest in its transportation rates, and has  
9 never objected before to IID's rights as an interested party on the issue.

10 (a) IID Has Tenaciously Contested MWD's Prior Wheeling Rates, With  
11 MWD Acknowledging IID's Interest

12 MWD filed a validation lawsuit in Los Angeles Superior Court in January of 1997. IID  
13 NOL, Exhibit O. MWD's Complaint sought to validate, pursuant to the Wheeling Law, two  
14 interrelated matters: "the legality of certain Wheeling Rates," and the "Fourth Supplemental  
15 Resolution for Commercial Paper and Revolving Notes." MWD specifically sought validation  
16 that its "Wheeling Rates," methodology and policies complied with the Wheeling Law. *Id.*

17 The case was transferred to the Judicial Council for assignment to a judge from a neutral  
18 county outside of Southern California. Chief Justice George assigned the case to the Honorable  
19 Laurence Kay of the San Francisco Superior Court, who was appointed to sit as a member of the  
20 Los Angeles Superior Court.

21 The case was bifurcated, with a Phase I trial set to deal with certain core legal issues.  
22 Judge Kay held that MWD's inclusion of costs unrelated to any possible transportation of  
23 transferred water, such as its costs to acquire State Water Project supplies and for member's local  
24 conservation programs, "violates the statutory definition of 'fair compensation.'" IID NOL,  
25 Exhibit P, p.6. Judge Kay found MWD's interpretation of the Wheeling Statutes to be inconsistent  
26 with numerous words in the statutes.

27

28

1 Judge Kay also found that the legislative intent behind the Wheeling Statutes was to  
2 encourage water transfers, and MWD's proposed statutory construction that would enable MWD  
3 to include its district-wide unrelated costs would violate that intent. *Id.*, pp.10-12. He also found  
4 many other errors in MWD's rate-setting. *Id.*, pp.12-14.

5 MWD appealed the Judgment. The Court of Appeal reversed, because it found that as a  
6 pure matter of law that the appealed MWD rate<sup>10</sup> would not necessarily always be unlawful in  
7 every circumstance, and said the matter had to be tried under the standards set by Water Code  
8 section 1813. *Metropolitan Water Dist. v. Imperial Irrigation Dist.* (2000) 80 Cal.App.4th 1403,  
9 1407. It remanded back to the lower court for such a trial. *Id.* IID participated as an active  
10 litigant all the way through appeal. *Id.*, p. 1437.

11 The way the prior litigation ended is important. MWD said it wanted to dismiss the case  
12 because its wheeling rates had expired, and it would set new applicable rates in the future:

13 The [MWD motion to dismiss] will be made on the ground that  
14 good cause exists to dismiss the action without prejudice, to wit:  
15 The wheeling rates sought to be validated have expired. When new  
wheeling rates are adopted by Metropolitan, they are likely to differ,  
perhaps substantially, from the old rates.

16 IID NOL, Exhibit Q, p. 1.

17 Based on its request, the trial court dismissed MWD's lawsuit. IID NOL, Exhibit R.

18 In this prior rate litigation, MWD not only admitted IID's standing to challenge its  
19 wheeling rates, but also acknowledged the reason why: that IID is a potential transferor of water  
20 which wants to use MWD's conveyance facilities. Here is what MWD said: "All of the parties in  
21 this litigation except for the Center for Public Interest Law had significant financial interests at  
22 stake. As counsel for IID stated at trial, all defendants (except CPIL) are potential transferors of  
23 water." IID NOL, Exhibit S.

24 ///

25 ///

26 ///

27

28 <sup>10</sup> MWD did not appeal the judgment against it as to its firm wheeling rate.

1 (b) MWD Knew That IID's Contract With SDCWA Stated That IID Had  
2 A Right To Participate In Any Litigation Over MWD's  
3 Transportation Rates And Is Now Estopped To Claim That IID Has  
4 No Standing

5 When IID and SDCWA negotiated their Revised Fourth Amendment to their water transfer  
6 agreement, they expressly stated that IID was a real party in interest to any litigation over the  
7 MWD transportation rate. Here is what they said in paragraph 4.1(c)(ii):

8 In any arbitration, litigation or other dispute-resolution mechanism  
9 to resolve the amount of the Actual Wheeling Rate, the Authority  
10 will cooperate, support and include IID's full participation as a real  
party in-interest.

11 MWD Trial Exhibit 2, pp. 126-127. (Emphasis added.)

12 MWD did not sign the IID-SDCWA agreement, but it did sign the QSA itself (MWD Trial  
13 Exhibit 3), which obligates it to support the terms of the IID-SDCWA agreement. MWD agreed  
14 that the IID-SDCWA transfer agreement was a key component of the QSA, and that it would  
15 defend all the terms of the overall settlement, which included the revised IID-SDCWA agreement.  
16 See QSA, Exhibit A (IID-SDCWA agreement and its Revised Fourth Amendment being the fourth  
17 and fifth documents referenced), and QSA sections 11.11, 11.10, Recital G, Recital L, Recital N,  
18 1.1(2), 1.1(54), 2.1(6), 6.1, and 6.2(15). (MWD Trial Exhibit 3.)

19 Indeed, MWD expressly contractually agreed that the IID-SDCWA agreement's terms,  
20 which included IID as a real party in interest as to litigation over MWD's wheeling rates, would  
21 apply to the QSA:

22 The terms and conditions applicable to IID's conservation and transfer  
23 of Conserved Water to SDCWA contemplated by this Agreement shall  
be as set forth in the 1998 IID/SDCWA Transfer Agreement.

24 MWD Trial Exhibit 3, section 2.1(C). (Emphasis added.) (Note: The "IID/SDCWA Transfer  
25 Agreement" is defined in the QSA as including the Revised Fourth Amendment; see QSA Section  
26 1.1(2). MWD Trial Exhibit 3.)

27  
28

1 The QSA contract MWD signed even called out section 4.1(c) of the IID-SDCWA transfer  
2 agreement, noting SDCWA's right to terminate early. MWD Trial Exhibit 3, Section 1.1(48).

3 MWD has received the benefits of the QSA and its related agreements, and is estopped to  
4 now deny their terms. Parties who have benefited from agreements cannot be heard to deny their  
5 provisions. *Estate of Cates* (1971) 16 Cal.App.3d 1, 14; *Anglo-California Trust Co. v. Oakland*  
6 *Railways* (1924) 193 Cal.451, 462; and *Butler v. Woodburn* (1942) 19 Cal.2d 420, 423.

7 **III. THE MWD RATE IS UNLAWFUL UNDER THE WHEELING LAW, AS**  
8 **PROPERLY STATED IN IID'S ANSWER**

9 IID's Answer<sup>11</sup> states, as an affirmative defense, that, "IID alleges that some or all of the  
10 actions of MWD referenced in the Complaint violate Water Code sections 1810-1814." IID NOL,  
11 Exhibit B, p.6(15-16). The only question as to this allegation in this bifurcated hearing is whether  
12 IID could say this in an answer, or was required to state it in a cross-complaint. IID was permitted  
13 by law to make this allegation in its answer.

14 Validation cases are not the typical civil action. They follow their own special procedural  
15 rules under particularized statutes. Those statutes show that IID's Answer here was proper.

16 The Legislature enacted a special set of statutes -- Code of Civil Procedure sections 860 to  
17 870.5 -- to address how litigation over certain public agency actions is to occur. California creates  
18 a special statutory *in rem* procedure for certain public agency matters to promote efficient and  
19 comprehensive validity determinations. As explained in *Embarcadero Mun. Improvement Dist. v.*  
20 *County of Santa Barbara* (2001) 88 Cal.App.4th 781, 789, "the purpose of the validation statutes  
21 is to provide a simple and uniform method for testing the validity of government action.  
22 [Citation.]" In *Millbrae School District v. Superior Court* (1989) 209 Cal.App.3d 1494, at 1497  
23 and 1499 the Court held, "a central theme in the validating procedures is speedy determination of  
24 the public agency's action," in order to further "the acting agency's need to settle promptly all  
25 questions about the validity of its action."

26  
27  
28 <sup>11</sup> Courtesy copy is Exhibit B to IID's NOL.

1 The validation statutes require, in Code of Civil Procedure section 863, that an entity  
2 which files a reverse validation suit must use the summons required by Code of Civil Procedure  
3 section 861.1 ("the summons shall be in the form prescribed in Section 861.1 . . ."). Section  
4 861.1 then specifically instructs persons interested in the public agency action at issue that they  
5 may "contest the legality or validity of the matter [stated in the summons] by appearing and filing  
6 a written answer to the complaint . . . ." (Emphases added.)

7 In other words, the Legislature clearly specified that interested persons can challenge  
8 ("contest") the legality of agency action at issue in a validation case by answer. These specific  
9 provisions for validation cases trump the generic answer provisions of CCP section 431.30(c),  
10 because specific statutes govern over general ones. *San Francisco Taxpayers Assn. v. Board of*  
11 *Supervisors* (1992) 2 Cal.4th 571, 577.

12 Thus, IID did exactly as was required by Code of Civil Procedure section 861.1.  
13 It contested the legality of MWD's rates by answer. IID timely filed its answer by the date  
14 specified in the Summons. IID's answer stated an additional legal rationale as to why MWD's pled  
15 action was unlawful (violation of the Wheeling Law) in addition to the rationale found in  
16 SDCWA's reverse validation complaint. It was stated as an affirmative defense, because by  
17 statute IID is addressing what MWD did in its answer ("contest the legality or validity of the  
18 matter [stated in the summons] by appearing and filing a written answer . . . ." Section 861.1).  
19 IID's stated "defense" to MWD's action was that MWD acted unlawfully under the Wheeling Law.

20 Though there is no statutory authority for cross-complaints found in the special validation  
21 procedure statutes, some courts have said it is permissible to file a cross-complaint in a validation  
22 case (*see Moorpark Unified School Dist. v. Superior Court* (1990) 223 Cal.App.3d 954). But,  
23 there is no requirement to do so. IID was addressing precisely the same rates SDCWA challenged  
24 in its Complaint, just articulating a different legal reason for the rate's invalidity.

25 MWD is asking this Court to disenfranchise IID because IID followed the instruction in  
26 section 861.1. IID should not lose its rights because it followed the law.

27  
28

1 **IV. CONCLUSION**

2 MWD asks this Court to eliminate IID's right to participate in this case over transportation  
3 rates which apply to IID, a water transferor with documented interest in using MWD's conveyance  
4 system. The Court should not approve this disenfranchisement request. IID should be allowed to  
5 stay in the case and assert all its arguments against MWD's rates.

6

7 Dated: August 8, 2011

ALLEN MATKINS LECK GAMBLE  
MALLORY & NATSIS LLP

8

9

By: \_\_\_\_\_

MARK J. HATTAM, Attorneys for  
Defendant IMPERIAL IRRIGATION  
DISTRICT

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28