KEKER & VAN NEST LLP
JOHN KEKER - # 49092
jkeker@kvn.com
DANIEL PURCELL - # 191424
dpurcell@kvn.com
DAN JACKSON - # 216091
djackson@kvn.com
WARREN A. BRAUNIG - # 243884
wbraunig@kvn.com
633 Battery Street
San Francisco, CA 94111-1809
Telephone: (415) 391 5400
Facsimile: (415) 397 7188

DANIEL S. HENTSCHKE
General Counsel
SAN DIEGO COUNTY WATER AUTHORITY
4677 Overland Avenue
San Diego, CA 92123-1233
Telephone: (858) 522-6791
Facsimile: (858) 522-6566

Attorneys for Plaintiff
SAN DIEGO COUNTY WATER AUTHORITY

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

SAN DIEGO COUNTY WATER AUTHORITY,

Petitioner and Plaintiff,

v.

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA; ALL PERSONS INTERESTED IN THE VALIDITY OF THE RATES ADOPTED BY THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA ON APRIL 13, 2010 TO BE EFFECTIVE JANUARY 2011; and DOES 1-10,

Respondents and Defendants.

Case No. CPF-10-510830

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SAN DIEGO COUNTY WATER AUTHORITY'S MOTION TO CONSOLIDATE CASES

Date: November 9, 2012
Time: 1:30 p.m.
Judge: Hon. Richard A. Kramer
Dept: 304

Date Filed: June 11, 2010

Trial Date: Not Set

SAN DIEGO COUNTY WATER AUTHORITY,

Plaintiff(s),

v.

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, et al.,

Defendant(s)

Case No. CPF-12-512466

Date: November 9, 2012
Time: 1:30 p.m.
Judge: Hon. Richard A. Kramer
Dept: 304

Date Filed: June 11, 2010

Trial Date: Not Set

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Court is now presiding over two separate cases challenging wholesale water rates adopted by the Metropolitan Water District of Southern California (MWD). The first challenges MWD's 2011 and 2012 rates ("the 2011-2012 case"); the second challenges MWD's 2013 and 2014 rates ("the 2013-2014 case"). The 2011-2012 case and the 2013-2014 case, both brought by the San Diego County Water Authority ("Water Authority"), present numerous common factual and legal questions. Both lawsuits:

- challenge MWD's rates because they assign certain water supply costs to MWD's "transportation" rates, in violation of numerous statutes and constitutional provisions;
- challenge the validity of MWD's so-called "Water Stewardship Rate," and the fact that this fund for subsidizing local conservation and water supply projects is treated as a "transportation" rate;
- allege that MWD's rates unlawfully discriminate against the Water Authority, the only MWD member agency that both purchases MWD water and uses MWD's pipes to transport a significant quality of water purchased from outside parties; and
- incorporate an independent claim for breach of contract arising out of the Water Authority's contract with MWD for the transportation of water purchased by the Water Authority from IID.

The two cases should be consolidated and proceed together.

Despite the obvious factual and legal overlap of these cases, MWD refuses to stipulate to their consolidation, arguing instead that they should be litigated sequentially, or on parallel tracks. *See* Decl. of Warren Braunig in Support of Mot. to Consolidate Cases ("Braunig Decl."), ¶¶ 2-4 & Exs. A-B. Indeed, MWD has now filed a motion to stay the 2013-2014 case in its entirety. MWD's position is particularly remarkable given its prior stipulation that transfer to this Court and assignment to the same judge would be "in the interests of judicial economy and conservation of the scarce resources of the California courts and the parties." *See id.*, Ex. C (Aug. 14, 2012

Stipulation to Transfer Venue), at 2:13-20. As MWD has already conceded, litigating these cases separately would be highly inefficient. It would require duplicative searches of document repositories and relevant custodians; multiple depositions of each relevant witness; repeated rounds of briefing on the same issues, with slightly different facts; and two separate bench trials. The Court should not countenance such a waste of time and judicial and public resources, especially in light of the statutory goal that cases brought under the Validation Statutes—like these—should be "speedily heard and determined." *See* Code Civ. Proc. § 867. The Court should exercise its consolidation authority and require the parties to litigate and try these two challenges in a single, consolidated proceeding.

II. ARGUMENT

Trial courts have broad discretion to consolidate related cases that involve "common questions of law or fact." *See* Code Civ. Proc. § 1048; *see also* Judicial Council of Cal., *Deskbook on the Management of Complex Civil Litigation* § 2.03[2] (2011 ed.). Consolidation does not alter the parties' rights; rather, its purpose "is merely to promote trial convenience and economy by avoiding duplication of procedure, particularly in the proof of issues common to both actions." *Estate of Baker*, 131 Cal. App. 3d 471, 485 (1982). Relevant factors for consolidation, therefore, include: the predominance of common legal or factual issues; overlap in evidence and witnesses; the convenience of parties and attorneys; the relative advancement of the actions; and judicial efficiency. *See Todd-Stenberg v. Dalkon Shield Claimants Trust*, 48 Cal. App. 4th 976, 979-80 (1996); *Estate of Baker*, 131 Cal. App. 3d at 485; *see also* Michael P. Thomas, Cal. Civ. Ctrm. Handbook & Desktop Ref. § 14:47 (2012 ed.). Not only does each of these factors tilt in favor of consolidation in the present case, but consolidation provides the opportunity for complete and final relief at the end of a unified trial, as opposed to sending the parties back to square one when the first trial is completed.

To be clear, the Water Authority is not asking the Court to merge the two cases entirely. Pursuant to Code of Civil Procedure section 1048, courts may consolidate cases in one of two ways: by completely consolidating the cases, such that there is a single set of pleadings and a single judgment; or by consolidating for trial, where "the pleadings, verdicts, findings and

judgments are kept separate [and] the actions are simply tried together for the sake of convenience and judicial economy." *See Sanchez v. Super. Ct.*, 203 Cal. App. 3d 1391, 1396 (1988). Given that the Water Authority challenges two distinct agency actions, the second form of consolidation—a unified pre-trial process and a single trial, with multiple judgments—seems the more appropriate course.

A. Common legal and factual issues predominate across the two cases and make consolidation the appropriate case-management tool.

In terms of the substantive legal claims presented, the 2011-12 case and 2013-14 case overlap substantially. The 2011-12 case includes six causes of action. The first three—for writ of mandate, declaratory relief, and determination of invalidity pursuant to Code of Civil Procedure section 860—are just different mechanisms for challenging MWD's rates. In the operative 2011-2012 Complaint,[1] the Water Authority alleges that MWD's 2011-2012 rates—in particular, the System Access Rate, the System Power Rate, and the Water Stewardship Rate—violate the Wheeling Statute, Water Code § 1810 *et seq.*; various other California statutes; the California Constitution; and common law. SAC ¶¶ 68-97. Specifically, MWD's rates charged for "transportation" of water exceed, or are unrelated to, MWD's cost of providing the services for which they are charged, and thereby discriminate against the Water Authority. *Id.* The Water Authority's fourth cause of action asserts that MWD violated the 2003 Exchange Agreement—under which MWD transports water the Water Authority purchased from IID—by charging a price that violates substantive California law. *Id.* ¶¶ 98-102. The fifth and sixth causes of action seek declaratory relief, respectively, relating to MWD's use of a so-called Rate Structure Integrity (RSI) provision to retaliate against the Water Authority for bringing the 2011-2012 case, *id.* ¶¶ 103-110, and relating to MWD's calculation of member agencies' preferential rights to water, *id.* ¶¶ 111-115.

The 2013-2014 Complaint includes the same first four causes of action, tailored to MWD's 2013-2014 rates. The first three causes of action—again for writ of mandate, declaratory

[1] The operative complaint is San Diego County Water Authority's Second Amended Petition for Writ of Mandate and Complaint for Damages and Declaratory Relief ("SAC"), filed on April 17, 2012.

relief, and invalidity—challenge the same components of MWD's 2013-2014 rates on most of the same statutory, constitutional and common law grounds. *See* SDCWA's Petition for Writ of Mandate and Complaint for Determination of Invalidity, Damages and Declaratory Relief, ¶¶ 67-99. The 2013-2014 Complaint also contains an equivalent claim for breach of contract. *Id.* ¶¶ 100-105.[2]

The legal issues presented by the two cases are practically identical. Procedurally, the Court will have to resolve the standard of review applicable to MWD's rate decisions, the scope of admissible evidence, and the impact of the Water Authority's standalone claim for breach of contract. Substantively, the Court must interpret the meaning of the Exchange Agreement, decide what constitutes unreasonable discrimination in ratemaking, and determine what it means, under the Wheeling Statute, for MWD to charge only "fair compensation," and, under the California Constitution, for MWD to charge rates that recover no more than its reasonable and proportional costs of service. These are just some of the common legal questions presented in both cases. As importantly, in applying the legal standards to the facts, the Court will benefit from having these cases tried together. For example, if MWD prepared a cost-of-service study in 2012 that is the primary basis for its 2013-2014 rates, the absence of a comparable study in 2010 could be relevant to the Court's analysis. Likewise, if the record for the 2013-2014 rates consists of no supporting evidence beyond that found in the 2011-2012 record, that fact too might be relevant to the Court's resolution of the rate challenges.

The two cases present common factual questions as well. In fact, MWD has often argued to the Court that, though its rates are newly adopted every year or two, its rate structure has been the same for a decade. *See, e.g.,* May 22, 2012 MWD's MPAs i/s/o Demurrers to the First through Fourth Causes of Action in the SAC, at 14:4-10. Many of the foundational documents on which the Court will be asked to consider and evaluate in each case—the Exchange Agreement, MWD's contract for State Water Project water with the California Department of

[2] The Water Authority did not re-plead its declaratory relief claims relating to the RSI Clause and preferential rights in the 2013-14 case because there was no need to do so; as to those claims, the Water Authority will receive complete relief from its claims in the 2011-12 case.

Water Resources, historical cost-of-service studies, consultants' reports, and industry standards—will be the same. The meaning of those documents, and what they indicate about whether MWD's rates are arbitrary and capricious, will not differ from one case to the next. And the same MWD and member agency personnel have relevant knowledge—and thus, might have to be deposed or testify—concerning both rate decisions.

Any minor differences MWD might purport to identify between the factual allegations and legal claims in the two complaints would hardly justify the burden and expense of trying two separate cases. Consolidation does not require that the two cases present identical allegations or causes of action. On the contrary, courts have often utilized consolidation precisely when two unique cases involve related facts but unique triggering events, or even distinct legal theories. *See, e.g., Todd-Stenberg*, 48 Cal. App. 4th at 979-80 (three plaintiffs separately harmed by defendant's defective intra-uterine device); *Estate of Baker*, 131 Cal. App. 3d at 475, 484-85 (consolidating a probate challenge and a civil action to set aside an allegedly fraudulent *inter vivos* grant of deed). Here, even the modest differences in the pleading of the legal claims will not affect their resolution. For example, while the 2013-2014 Complaint more explicitly calls out the applicability of Proposition 26 (codified at Article XIII C, Section 1 of the California Constitution) to MWD's rates, the Water Authority has long taken the position before this Court that Prop. 26 applies to the 2011-2012 rate challenge. *See* Braunig Decl., Ex. D (May 26, 2011 SDCWA "Rule 26" Statement), at 10-13.[3] Even should the Court decide, for whatever reason, that separate standards apply to the two different rate challenges, this Court is more than capable of applying two different standards within the context of a consolidated case.

Nor does it matter that MWD may choose to lodge a separate "administrative record" for

[3] Although Proposition 26 was approved by the voters in November 2010, after the 2011-2012 rates were *adopted*, it applies prospectively to those rates because they were *imposed* in 2011 and 2012, and are being *challenged* now. *See Murphy v. City of Alameda*, 11 Cal. App. 4th 906, 912-13 (1992) (applying new statutory presumption and burden-shifting rules to local zoning ordinance passed eight years before the new rules took effect, because the statute applied prospectively to future challenges). Thus, MWD must carry the burden of proof to establish, by a preponderance of evidence, that the amount it charges for its services are "no more than necessary to cover the reasonable costs of the governmental activity" and "bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." Cal. Const. Art. XIII C, § 1(e).

the 2013-14 case. This Court long ago rejected MWD's argument that the case will be limited to MWD's hand-picked administrative record, ruling instead that the Court may consider "all relevant evidence" in determining whether MWD's rates violate the Wheeling Statute. *See* Braunig Decl., Ex. E (Jan. 6, 2012 Hearing Tr.) at 5:12-6:1, 31:17-32:5; Sept. 17, 2012 Order re: Motions for *De Novo* Review of Discovery Management Recommendation # 1, at 2:19-24; *see also* Water Code § 1810, 1813 . The Water Authority's additional breach of contract claims, which are subject to normal civil evidentiary rules, render MWD's official "administrative record" little more than a formality.

B. Consolidation will promote the interests of judicial economy.

Consolidating the cases would also generate numerous other practical benefits. *First*, consolidation would eliminate the need for duplicative discovery processes. Discovery in the two cases, and the burdens associated with discovery, will overlap substantially. The Water Authority has already served document requests on MWD, the Member Agencies and non-parties Malcolm Pirnie and Cordoba in the 2013-2014 case that are the mirror-image of the discovery this Court just approved in the 2011-2012 case, adjusted only to reflect the later date of the MWD decisions. *Compare* Sept. 17, 2012 Order *with* Braunig Decl., Exs. F-I. The relevant custodians from whom documents will need to be collected are the same. As those parties respond to two parallel sets of requests, they ought to do so by making a single production, providing a single privilege log, and litigating common disputes in a single proceeding. In the absence of consolidation, the Water Authority and IID will be forced to serve, and the defendants will be forced to answer, overlapping sets of interrogatories and requests for admission. If the parties then disagree about the completeness of those responses, the Water Authority and IID would have to file multiple motions to compel, requiring the Court to sift through independent "separate statements" and issue competing orders. And, should there be depositions in this case, absent consolidation, the Water Authority and IID anticipate they would have to take all the same depositions twice, covering many of the same issues but with one focused on the 2011-2012 decision and another focused on the 2013-2014 decision. Such headaches can easily be avoided through consolidation.

Second, consolidation will allow both challenges under the Validation Statutes to be

"speedily heard and determined." Code Civ. Proc. § 867. As MWD has often reminded this Court, the Validation Statute serves to "further the important public policy of speedy determination of the public agency's action." *McLeod v. Vista Unified Sch. Dist.*, 158 Cal. App. 4th 1156, 1166 (2008). Of course, in this case, "speedy" is a relative term. Over two-and-a-half years, MWD has systematically delayed resolution of the 2011-2012 case: first, by insisting on a lengthy mini-trial on the standing of IID and UCAN; then, by taking a writ from this Court's interpretation of the Wheeling Statute; and then, by refusing to respond to discovery until the Discovery Referee recommended, and this Court ordered, that it do so. The result of MWD's machinations is that the 2011-2012 case and the 2013-2014 are almost completely aligned procedurally. Given that discovery in the 2011-2012 case likely will continue for the next 6-9 months, the 2013-2014 case will quickly catch up. The cases should be consolidated in order to keep them on the same track, and ensure that both challenges are resolved as quickly as possible.

Third, consolidating the cases for trial will enable the Court to fashion relief that resolves *all* disputes between the parties. For example, if the Court found that MWD's 2011-2012 rates were arbitrary and capricious but left the 2013-2014 rates to be resolved later, the parties would still have to litigate whether MWD's rates were adequately supported on the (slightly different) record for the 2013-2014 case. Not only would trying these cases sequentially impose a substantial, duplicative burden on the parties and the Court; it also would create the possibility of conflicting appellate rulings and discourage settlement, because the losing party would be guaranteed a full second bite at the apple.

C. MWD's objections to consolidation are merely an effort to slow down full resolution of these rate disputes.

MWD opposes consolidation because, MWD claims, doing so would slow down resolution of the 2010 rate challenge filed two-and-half years ago. *See* Braunig Decl., Ex. B. Of course, the only reason the 2011-2012 case remains unresolved is because MWD has thrown up one procedural roadblock after another. In any event, consolidation will not adversely affect the timing of the 2011-2012 case. While MWD points out that it has not yet answered the 2013-2014 complaint, the operative 2011-2012 complaint was answered only three months ago, and the

Parties are close to finalizing a stipulation that would allow MWD to answer the 2013-2014 complaint before the end of October. And, rather than re-litigating issues that were already decided in the 2011-12 case, the Water Authority has offered to treat those rulings as applicable to the 2013-14 case as well. For example, when MWD filed a motion to strike portions of the 2013-14 Complaint that mirrored its motion in the 2011-12 Complaint, the Water Authority offered to stipulate that the Court's July 2, 2012 ruling on MWD's previous motion to strike would apply equally to the 2013-14 Complaint.

Likewise, in the interest of moving the 2013-14 case toward a swifter resolution, the Water Authority has sought a stipulation to avoid re-litigating discovery issues. Four weeks ago, as soon as the case was transferred to San Francisco Superior Court, the Water Authority served discovery on MWD (and all other relevant parties and non-parties) in the 2013-2014 case. *See* Braunig Decl., Exs. F-I. Because these document requests are the exact same document requests recently heard and approved in the 2011-12 case (but tailored to the 2013-14 MWD rates), the Water Authority proposed a stipulated order that would simply follow the letter and language of the Court's September 17, 2012 discovery order. *See* Braunig Decl., Ex. J. Incredibly, given MWD's claimed concern for speedy resolution, MWD refused that stipulation and instead has insisted both on waiting the full thirty days to state its positions on the discovery, and then re-starting the discovery referee process with Judge Warren before it provides responsive documents. *See* Braunig Decl., Ex. K. That is absurd. Once MWD is ordered it must produce documents—and it seems, once again, that MWD will have to be ordered—discovery in the 2013-2014 case should proceed rapidly, the two cases will be on an identical track, and all remaining issues can be resolved together.[4]

Consolidation would not create any further delays; it would greatly reduce them. The goal of consolidation, and of any case management plan, should be to resolve the entirety of both cases

[4] MWD's recent suggestion that consolidation is inappropriate because it needs time to assemble an "administrative record" for the 2013-2014 case is a manufactured issue. The 2013-2014 case was filed more than four months ago. If MWD has not yet begun to assemble an administrative record or otherwise collect the relevant document concerning the adoption of those rates, MWD has no one to blame but itself and should not be heard to complain after sitting on its hands for so long.

by late 2013. If MWD has its way, and the later-filed case is delayed or stayed, the 2013-2014 rate case will have little chance of being resolved before the end of 2014, which means the parties will end up fighting over MWD's 2015 and 2016 rates as well. The Court should consolidate the cases, set a trial date, and enable the (relatively) "speedy resolution" of both cases.

III. CONCLUSION

Pursuant to its authority under Code of Civil Procedure section 1048, the Court should consolidate the 2013-2014 case, Case No. CPF-12-512466, with the 2011-2012 case, Case No. CPF-10-510830.

Respectfully Submitted,

Dated: October 18, 2012

KEKER & VAN NEST LLP

By: */s/ Warren A. Braunig*
WARREN A. BRAUNIG

Attorneys for Plaintiff
SAN DIEGO COUNTY WATER AUTHORITY