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16 SUPERIOR COURT OF THE STATE OF CALIFORNIA

17 COUNTY OF SAN FRANCISCO

18  
19 SAN DIEGO COUNTY WATER  
AUTHORITY,

20 Petitioner and Plaintiff,

21 v.

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

27 Respondents and Defendants.  
28

CASE NO. CPF-12-512466

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
METROPOLITAN WATER DISTRICT  
OF SOUTHERN CALIFORNIA'S  
MOTION FOR JUDGMENT ON THE  
PLEADINGS**

Date: August 22, 2013

Time: 10:30 a.m.

Dept.: 304

Judge: Hon. Curtis E. A. Karnow

Action Filed: June 8, 2012

Trial Date: December 17, 2013

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1 The Metropolitan Water District of Southern California (“MWD”) respectfully submits  
2 this memorandum in support of its motion for judgment on the pleadings.

3 **I. INTRODUCTION**

4 MWD was created to act as a regional wholesale seller of imported water to supplement  
5 the water supplies of its member agencies. It is a collective with a voluntary membership  
6 governed by a Board of Directors comprised only of member agency representatives—every  
7 member having direct representation on the Board. Through their representatives, the members  
8 establish the rates that they pay to purchase MWD’s water or to use MWD’s water system.

9 In a separate section of its Petition/Complaint, the San Diego County Water Authority  
10 (“SDCWA”)—one of MWD’s member agencies—alleges that “Metropolitan’s rates are invalid  
11 under Proposition 26.” Pet./Compl., § V.H., ¶¶ 55-59. Notwithstanding the reference to  
12 Proposition 26 in this section and in each of SDCWA’s four causes of action, SDCWA alleges that  
13 MWD’s rates are subject to Article XIII C of the California Constitution and are invalid for failing  
14 to comply with Article XIII C. The pleadings and the judicially noticeable materials establish that,  
15 as a matter of law, SDCWA’s Article XIII C claims fail for three independent reasons.

16 *First*, for Article XIII C to apply, the charge at issue must be “imposed.” MWD’s rates are  
17 not “imposed.” SDCWA and the other member agencies that pay the rates are voluntary members  
18 of MWD, set the rates themselves, and choose to purchase water from MWD or to use its water  
19 system and thus to incur the charge. Moreover, this voluntary system does not create a tax  
20 covered by Article XIII C. Nothing in the initiative language or ballot arguments indicates that,  
21 by Proposition 26, the voters intended to displace the established law governing MWD’s rate-  
22 setting and rates with Article XIII C’s constitutional tax provisions. The established statutory and  
23 common law rules are fundamental to MWD’s ability to fulfill its mission as a supplemental  
24 regional water supplier and they provide the standards by which the rates are to be measured under  
25 judicial review.<sup>1</sup>

26  
27  
28 <sup>1</sup> MWD’s rates must be set in accordance with its enabling act and other applicable statutory  
(footnote continued)

1           *Second*, even assuming *arguendo* that MWD’s rates were “imposed,” MWD’s rates clearly  
2 qualify for one of Article XIII C’s express exemptions: MWD’s rates are charges for the purchase  
3 or use of government property. MWD’s rates are thus expressly excepted from the definition of  
4 taxes under Article XIII C’s plain terms.

5           *Third*, even assuming *arguendo* the rates could qualify as taxes that are subject to Article  
6 XIII C—which they cannot for the two separate reasons explained above—SDCWA cannot  
7 establish the claims as a matter of law because MWD satisfied the voter-approval requirement.  
8 Taxes subject to Article XIII C do not violate that Article if two-thirds of the electorate approve  
9 them. Here, the rates were considered and approved by a vote of 76% of the relevant electorate,  
10 the member agencies through their representatives on MWD’s Board of Directors.

11           This Court should enter judgment in MWD’s favor on the Article XIII C claims contained  
12 in the Petition/Complaint’s four causes of action.

## 13 **II. ARGUMENT**

### 14 **A. The Court May Determine Whether Article XIII C Applies To MWD’S** 15 **Rates By This Motion**

16           Judgment may be entered on the pleadings when the facts alleged and subject to judicial  
17 notice demonstrate that a complaint fails to establish a cause of action. Cal. Code Civ. Proc. §§  
18 438(c)(1)(B)(ii), (d). The standard applied is “the same as that applicable to a general demurrer.”  
19 *Schabarum v. Cal. Legislature*, 60 Cal. App. 4th 1205, 1216 (1998). Thus, a motion for judgment  
20 on the pleadings admits all material facts pleaded, but disregards “conclusions of fact or law,  
21 opinions, speculation, or allegations contrary to law or judicially noticed facts.” *Shea Homes Ltd.*  
22 *P’ship v. County of Alameda*, 110 Cal. App. 4th 1246, 1254 (2003).

23           In each of its four causes of action, SDCWA clusters several separate legal theories  
24 together. Nonetheless, the Petition/Complaint separately alleges the purported violation of  
25 Proposition 26/Article XIII C by MWD (Pet./Compl., § V.H., ¶¶ 55-59; First “Cause of Action”, ¶  
26 \_\_\_\_\_  
27 requirements, as well as common law. This motion addresses only the inapplicability of Article  
28 XIII C.

1 68 (p. 24, lines 14-15); Second “Cause of Action”, ¶ 84 (p. 27, lines 21-23); Third “Cause of  
2 Action”, ¶ 96 (p. 30, lines 10-14) and ¶ 97 (p. 31, lines 6-8); Fourth “Cause of Action”, ¶ 103 (p.  
3 32, lines 10-12)), and the Court may separately evaluate SDCWA’s claims that MWD’s rates  
4 violate Article XIII C. Ordinarily, a motion for judgment on the pleadings addresses an entire  
5 cause of action. Trial courts managing complex litigation, however, have broad discretion to use a  
6 motion for judgment on the pleadings to resolve individual legal theories that should have been  
7 pled as separate causes of action. *Fire Ins. Exch. v. Super. Ct.*, 116 Cal. App. 4th 446, 452 (2004).

8 Further, it is critical that the Court determine the issues presented before the final hearing.  
9 Among other things, Article XIII C shifts the burden of proof to the local government on key  
10 issues. *See* Cal. Const. art. XIII C, § 1(e), unnumbered para. The Article XIII C claims therefore  
11 differ from the other claims that comprise SDCWA’s rate challenge, on which SDCWA holds the  
12 burden of proof. Because Article XIII C does not apply to MWD’s rates and SDCWA cannot  
13 establish an Article XIII C claim as a matter of law, the burden of proof at the rate challenge  
14 hearing should remain on SDCWA. It will be difficult for either party to prepare appropriately for  
15 the final hearing if the applicability of Article XIII C remains an open question.

#### 16 **B. SDCWA’s Article XIII C Claims Fail As A Matter Of Law**

17 As amended by Proposition 26, Article XIII C provides that local governments may not  
18 “impose” a charge that qualifies as a tax, without voter approval. A special tax must be approved  
19 by a two-thirds vote of the electorate. Cal. Const. art. XIII C, §§ 1(e), (2)(d). Sections 1(e)(1)  
20 through 1(e)(7) of Article XIII C state seven exceptions to its application. Cal. Const. art. XIII C,  
21 § 1(e) (“As used in this article, ‘tax’ means any levy, charge, or exaction of any kind imposed by a  
22 local government, except the following.”). One of the exceptions is: “A charge imposed for  
23 entrance to or use of local government property, or the purchase, rental, or lease of local  
24 government property.” Cal. Const. art. XIII C, § 1(e)(4).

#### 25 **1. Article XIII C Does Not Apply To MWD’s Rates Because They Are Not** 26 **“Imposed”**

27 The charges governed by Article XIII C are only those that are “imposed” by a government  
28 entity: “As used in this article, ‘tax’ means any levy, charge, or exaction of any kind imposed by a



1 local government, except the following . . . .” Cal. Const. art. XIII C, § 1(e). SDCWA’s  
2 allegations in the Petition/Complaint establish that MWD’s rates are not “imposed” like taxes,  
3 rather they are only paid by its members that set the rates and then choose to purchase MWD’s  
4 supplemental water or use MWD’s water system. They are not the kinds of charges intended to be  
5 covered by Article XIII C.

6 **a. The Rates Are Voluntary**

7 “Metropolitan is a wholesale water agency . . . [that] has 26 member agencies, including  
8 [SDCWA].” Pet./Compl., ¶ 20. MWD imports water from the Colorado River and the State  
9 Water Project “for sale to its member agencies.” Pet./Compl., ¶ 21. “Metropolitan has a board of  
10 directors, which includes at least one representative appointed by each member agency.”  
11 Pet./Compl., ¶ 23. MWD’s member agencies, including SDCWA, may acquire water from  
12 sources other than MWD. Pet./Compl., ¶¶ 27-28. MWD sets its water rates through the vote of its  
13 Board of Directors and, “[i]n every rate-setting cycle, Metropolitan has discretion to add or change  
14 its rates and charges, or the allocation of Metropolitan’s costs among its rates and charges and  
15 among its member agencies, so long as cost-of-service requirements are met.” Pet./Compl., ¶ 33.  
16 MWD is required by its enabling state statute, the Metropolitan Water District Act<sup>2</sup> (“MWD Act”),  
17 to conduct its business based on a majority vote of the member agency representatives on its  
18 Board. MWD Act § 57.

19 The word “imposed” means “to establish or apply by authority or force.” *Ponderosa*  
20 *Homes, Inc. v. City of San Ramon*, 23 Cal. App. 4th 1761, 1770 (1994) (citing Webster’s Third  
21 New Int’l Dictionary 1136 (1970)); *see also* American Heritage Dictionary 881 (4th ed. 2000)  
22 (defining impose as “To establish or apply as *compulsory*,” or “To apply or make prevail by or as  
23 if by *authority*,” or “To obtrude or *force . . . upon another or others*”) (emphasis added); *see also*  
24 *Bighorn-Desert View Water Agency v. Verjil*, 39 Cal. 4th 205, 215 (2006), (citing *Richmond v.*

25  
26 <sup>2</sup> The Metropolitan Water District Act was initially adopted in 1927, and repealed and re-enacted  
27 in 1969. 1969 Stats., ch. 209. Although uncodified, it is published in West’s Annotated  
28 California Water Code-Appendix, Ch. 109 (West 1995) and Deering’s California Water Code-  
Uncodified Acts, Act 570 (LexisNexis 2008).

1 *Shasta Cmty. Servs. Dist.*, 32 Cal. 4th 409, 426-27 (2004)) (distinguishing between fees imposed  
2 as an incident of property ownership and fees incurred as a result of a voluntary decision to apply  
3 for a water service connection).

4 MWD's rates are not established by authority or force, and are not compulsory. No  
5 authority—before or after Proposition 26—suggests that a charge established directly by those  
6 who pay it—especially where the payors are members of a voluntary collective—could properly  
7 be considered “imposed” or a “tax.” Rather, the courts have consistently treated a tax as a  
8 compulsory payment imposed by government without the consent of the payor. *See Schmeer v.*  
9 *County of Los Angeles*, 213 Cal. App. 4th 1310, 1326-27 (2013) (“The term ‘tax’ in ordinary  
10 usage refers to a compulsory payment made to the government or remitted to the government.”);  
11 *see also Cal. Farm Bureau Fed. v. State Water Res. Control Bd.*, 51 Cal. 4th 421, 437 (2011)  
12 (distinguishing taxes, which are “compulsory,” from fees, which involve “a voluntary decision to  
13 develop or seek other government benefits or privileges”).

14 MWD's rates are fundamentally different. First, MWD's rates are wholesale water rates  
15 and there is no support for the idea that Proposition 26—or Article XIII C generally—is directed  
16 at wholesale water rates. Second, SDCWA and the other member agencies that pay the rates are  
17 voluntary members of MWD. Third, MWD's rates are not paid by the general public or even a  
18 large number of water wholesalers and retailers, but by the small group of 26 MWD *members*.  
19 There is not a single California authority that reasonably supports the idea that charges paid by the  
20 members of a voluntary collective could reasonably be considered “imposed” or a “tax.” Fourth,  
21 the rates are set directly by the representatives of the members themselves. Since SDCWA joined  
22 MWD in the 1940s, it has actively participated in the rate setting process. *See, e.g., Pet./Compl.*,  
23 ¶¶ 46-48 (describing SDCWA's participation in the rate-setting process for the 2013-2014 rates  
24 being challenged in this action). Fifth, members incur the rates voluntarily. MWD is a  
25 supplemental supply source and members incur the rates only if they purchase water from MWD  
26 or use MWD's water system. The members choose whether or not to purchase water from MWD  
27 or to use its water system, and thus whether or not to incur the charge. SDCWA's circumstances  
28 are illustrative. It purchases water from MWD but also obtains water from the Imperial Irrigation

1 District and other sources. Pet./Compl., ¶¶ 26-28. Indeed, SDCWA’s Petition/Complaint is based  
2 on SDCWA’s choice to acquire water from a third party and transport that water through MWD’s  
3 system. *See, e.g.*, Pet./Compl., ¶ 62.

4 **b. The Rates Are Not Taxes**

5 The intent of the voters in approving Proposition 26 and the nature of MWD’s rates further  
6 establish that the rates are not imposed taxes.

7 “When construing a constitutional provision enacted by initiative, the intent of the voters is  
8 the paramount consideration.” *Davis v. City of Berkeley*, 51 Cal. 3d 227, 234 (1990); *see also*  
9 *Richmond*, 32 Cal. 4th at 418 (a court must “determine and effectuate the intent of those who  
10 enacted the constitutional provision at issue”). “The principles of constitutional interpretation are  
11 similar to those governing statutory construction. If the language is clear and unambiguous, the  
12 plain meaning governs. But if the language is ambiguous, [courts will] consider extrinsic  
13 evidence in determining voter intent, including the Legislative Analyst’s analysis and ballot  
14 arguments for and against the initiative.” *Silicon Valley Taxpayers’ Ass’n v. Santa Clara County*  
15 *Open Space Auth.*, 44 Cal. 4th 431, 444-45 (2008) (internal citations and quotations omitted); *see*  
16 *also Schmeer*, 213 Cal. App. 4th at 1316-17 (applying analysis to Proposition 26). Also  
17 significant is the measure’s “historical background.” *See Greene v. Marin County Flood Control*  
18 *& Water Conservation Dist.*, 49 Cal. 4th 277, 284 (2010) (quoting *Howard Jarvis Taxpayers*  
19 *Ass’n v. City of Riverside*, 73 Cal. App. 4th 679, 681-82 (1999)) (holding that earlier, related  
20 Proposition 218 is “best [] understood against its historical background”); *Schmeer*, 213 Cal. App.  
21 4th at 1327-28 (construing Proposition 26 based in part on “the historical foundations of the  
22 initiative”).

23 Article XIII C of the Constitution was added by Proposition 218 in 1996. It added  
24 provisions related to voter approval of local taxes. In 2010, the people of California adopted  
25 Proposition 26, an initiative measure, which was intended to prevent government agencies from  
26 disguising “new taxes as ‘fees’ in order to extract even more revenue from California taxpayers.”  
27 Ballot Pamp., General Elec. (November 2, 2010), at 114 (Request for Judicial Notice (“RJN”), Ex.  
28 A). In particular, the proponents of the initiative argued that the measure would prevent “Hidden

1 Taxes” while protecting “Legitimate Fees” used to pay for the government services. RJN, Ex. A  
2 at 60.

3 As a special purpose public agency, MWD has no regulatory authority and serves the  
4 primary governmental purpose of delivering water to its member agencies. Its powers and  
5 purposes are constrained by its enabling act, which limits its activities to the acquisition and sale  
6 of water at wholesale for municipal and domestic uses, the performance of water conservation  
7 efforts, and related activities such as acquiring or generating power to pump the water. MWD Act  
8 §§ 25, 120, 130, 131, 137, 139. MWD’s Board is directed by the enabling act to set the rates at  
9 which water is sold so that, together with revenue from stand-by or availability service charges or  
10 assessments, there is sufficient revenue to pay MWD’s expenses. MWD Act §§ 133, 134, 134.5.<sup>3</sup>

11 MWD sets its rates according to long-standing statutory procedures and standards, and the  
12 common law. Applying Article XIII C to MWD’s rates would necessarily impact that existing  
13 legal scheme, but nothing in Proposition 26 suggests that voters intended that result. The measure  
14 should not be construed in a manner that creates this unintended consequence. *Metropolitan*  
15 *Water Dist. v. Dorff*, 98 Cal. App. 3d 109, 114 (1979) (holding that Proposition 13 did not  
16 invalidate MWD’s statutory authority to impose property taxes on newly annexed lands, stating,  
17 “[t]he implied repeal of a statute by a later constitutional provision is not favored; in fact the  
18 presumption is against such repeal, especially where the prior statute has been generally  
19 understood and acted upon”).

20 The recent *Sunset Beach* case is instructive. There, the city sought to annex a relatively  
21 small territory, and thereby impose utility and pension override taxes, without a vote, as is allowed  
22 under the law. *Citizens Ass’n of Sunset Beach v. Orange Cnty. Local Agency Form’n Comm’n*, 209  
23 Cal. App. 4th 1182, 1185 (2012) (citing Cal. Gov’t Code §§ 56375.3, 57330). An association of  
24 residents sued, claiming that, under Article XIII C, taxes could not be levied on them until

25 \_\_\_\_\_  
26 <sup>3</sup> MWD also has statutory authority to set ad valorem property taxes. MWD Act § 300 *et seq.*;  
27 *see also Pasadena v. Chamberlain*, 204 Cal. 653, 664 (1928). MWD may also set benefit  
28 assessments on real property. MWD Act § 134.6. SDCWA is not challenging MWD’s property  
taxes or benefit assessments, but only its water rates.

1 approved by local voters. *Id.* at 1185-86. The trial court denied relief and the Court of Appeal  
2 affirmed for two reasons.

3 First, the court found that application of Proposition 218’s voter approval requirements to  
4 annexation proceedings would greatly complicate annexation, possibly requiring three or more  
5 separate elections. *Id.* at 1190-91. Second, proposed annexations would raise interpretive issues  
6 regarding when exactly “additional taxes” would be imposed. *Id.* at 1191. If Article XIII C, § 2  
7 were intended to have such effect, the drafters would have said so. That they did not, the court  
8 held, meant that voters did not intend Proposition 218 to apply to annexations. *Id.* at 1191. Thus,  
9 even though Proposition 218 “can be read” to govern annexations, the court rejected such a broad  
10 reading as inconsistent with voter intent. *Id.* at 1194.

11 Here, the Legislature and common law long ago established procedural and substantive  
12 rules for MWD’s rates. For example, under the MWD Act, the Board must set the rates, which  
13 should be at levels the Board believes sufficient to cover operating expenses of the district, repairs  
14 and maintenance, costs for property or services or other rights acquired by the district, and  
15 principal and interest on appropriately-issued debt. MWD Act § 134. The rates must be set late  
16 enough to ensure reliable information and sound judgment, but early enough for members to  
17 establish their rates. The Legislature never suggested that the charges it was authorizing were  
18 “taxes” and never authorized “taxes” be imposed on members. The rates cannot reasonably be  
19 understood as “hidden taxes” levied by “politicians” on “consumers.”

20 SDCWA acknowledges that MWD can set its water rates annually.<sup>4</sup> Pet./Compl., ¶ 33.  
21 The Board must adopt rates close in time to the relevant rate period to ensure that its assumptions  
22 are sound given the variables inherent in water management. *See Sonoma Cnty. Water Coalition*  
23 *v. Sonoma Cnty. Water Agency*, 189 Cal. App. 4th 33, 46 (2010) (“[S]ome level of uncertainty is a  
24 permanent, inherent feature of modern water management. It arises from a wide range of  
25 scientific and legal regulatory factors that cannot be avoided.”) (internal quotations omitted). On

26 \_\_\_\_\_  
27 <sup>4</sup> For its last two rate cycles, MWD’s Board has chosen to adopt biennial rates (Pet./Compl., ¶33),  
28 but it is not obligated to continue doing so.

1 the other hand, it must adopt rates sufficiently in advance of collections so that the new rates can  
2 inform member agencies' rate-setting proceedings. MWD's Board cannot perform its statutory  
3 duty to ensure that rates will produce revenues required to cover costs if every rate determination  
4 is subject, as SDCWA may assert, to an annual vote of millions of people within MWD's service  
5 area. The MWD Act resolves these issues by vesting rate-setting authority in the member  
6 agencies, through their representatives on the Board.

7 Application of Article XIII C to MWD's rate-setting and rates would seriously undermine  
8 established statutory and common law rules, and nothing suggests that the voters intended such a  
9 result in approving Proposition 26. That result should be avoided and Article XIII C should be  
10 construed not to cover the rates. MWD's rates are not imposed taxes subject to Article XIII C.

11 **2. MWD's Rates Are Excepted From The Definition Of Taxes Because**  
12 **They Are Charges For Purchase Or Use Of Government Property**

13 Even if it is assumed MWD's rates are imposed—which is not the case—Article XIII C  
14 does not apply for the separate reason that an exception applies. Under Article XIII C, even if a  
15 charge is “imposed” by a local agency, several categories of charges are nevertheless excepted  
16 from the definition of “tax.” Cal. Const. art. XIII C, § 1(e)(1)-(7). One of those exceptions  
17 plainly applies to MWD as a matter of law. Article XIII C, § 1(e)(4) provides:

18 As used in this article, ‘tax’ means any levy, charge, or exaction of any kind imposed by a  
19 local government, except the following:

20 \* \* \*

21 (4) *A charge imposed for entrance to or use of local government property, or the*  
22 *purchase, rental, or lease of local government property.*

23 Cal. Const. art. XIII C, § 1(e)(4) (emphasis added).

24 Notably, this exception—unlike two others—contains no additional requirement that the  
25 charge “not exceed the reasonable costs.” *Compare* Cal. Const. art. XIII C, § 1(e)(4) *with* §  
26 1(e)(1)-(2).

27 Whether the rates at issue are for the use of the MWD water system (real property) or the  
28 purchase of water (personal property), the pleadings and judicially noticeable materials

1 demonstrate that MWD’s rates are within this property exception because they are charges for use  
2 or purchase of government property.

3 **a. The Water MWD Provides To Member Agencies Is MWD’s**  
4 **Property**

5 The MWD Act gives MWD the authority, among other things, to acquire and sell water at  
6 wholesale and to acquire or generate power to pump the water. MWD Act §§ 25, 120, 130, 131,  
7 137, 139. In California, “[t]here may be ownership of all inanimate things which are capable of  
8 appropriation or of manual delivery.” Cal. Civ. Code, § 655. Once water has been appropriated, it  
9 becomes personal property, capable of ownership. “When severed from the realty, reduced to  
10 possession and placed in containers, [water] becomes *personal property*.” *Santa Clarita Water*  
11 *Co. v. Lyons*, 161 Cal. App. 3d 450, 461 (1984) (emphasis in original); *see also California v.*  
12 *Super. Ct.*, 78 Cal. App. 4th 1019, 1027 n. 11 (2000). “Containers” includes “artificial  
13 watercourses or conduits through which water flows.” *Watts Industries, Inc. v. Zurich American*  
14 *Ins., Co.*, 121 Cal. App. 4th 1029, 1043-44 (2004) (holding that “[s]ince a municipal water system  
15 is a conduit through which water flows continuously . . . the municipality owns all the water in its  
16 system at any one time as an entire body”). In *Lewis v. Scazighini*, 130 Cal. App. 722, 724 (1933),  
17 the court held that when water was delivered to an oil company for industrial use, it “became  
18 severed from the real property on which it was produced and became personalty.” The court  
19 stated that “water, separated from its source or from the body of which it constituted a part, may  
20 be bought and sold like other commodities, as when it is supplied through artificial conduits for  
21 domestic use.” *Id.*

22 MWD diverts water into its own facilities pursuant to contracts with the California  
23 Department of Water Resources (“DWR”) for State Water Project water, and the U.S. Department  
24 of Interior (“DOI”) for Colorado River water. Pet./Compl., ¶ 21. Regarding State Water Project  
25 water, state law authorizes entities to contract with DWR for the purchase or use of water from the  
26 State Water Project. *See* Cal. Water Code, § 11625 (authorizing an entity to “enter into contracts  
27 with [DWR] for the purchase or for the use of water”); *see also* Cal. Water Code, § 12937  
28 (requiring DWR to pay for the State Water Project from “revenues derived from the sale, delivery

1 or use of water”). Regarding Colorado River water, Section 5 of the Boulder Canyon Project Act  
2 (43 U.S.C. § 617d) authorizes the Secretary of the Interior to contract for the delivery of water  
3 from the Colorado River.

4 Once MWD diverts water from DWR or DOI into MWD’s system, the water becomes  
5 MWD’s personal property. Thus, MWD’s charges for the water it delivers and sells it for the use  
6 and purchase of government property.

7 **b. MWD’s Conveyance Infrastructure Is Local Government Real**  
8 **Property**

9 SDCWA focuses its rate challenge, including its claims under Article XIII C, on MWD’s  
10 transportation rate components. SDCWA pays only these transportation rates for its non-MWD  
11 water supplies delivered to SDCWA through MWD’s water system. *See, e.g.,* Pet./Compl., ¶ 38.  
12 MWD’s conveyance infrastructure is local government real property. *See Robinson v. City of*  
13 *Glendale*, 182 Cal. 211, 213 (1920) (“Where pipes are laid in real estate for the purpose of  
14 carrying water to the lands to which they extend, the pipes, while imbedded in the soil, constitute  
15 real property both before the water is carried therein and after the use for that purpose has  
16 ceased.”); *see also* Cal. Civ. Code § 658 (defining real property to include land, fixtures, and  
17 things that are incidental or appurtenant to land). While the State Water Project system is the  
18 state’s real property, MWD’s contractual right to use that property to receive water from DWR is a  
19 property interest. *See Golden West Baseball Co. v. City of Anaheim*, 25 Cal. App. 4th 11, 36  
20 (1994) (“Like an easement, [a license to use property] is an interest in property which is less than  
21 an estate.”).

22 Therefore, even just the transportation components of MWD’s rates are excepted from the  
23 definition of taxes in Article XIII C. Cal. Const. art. XIII C, § 1(e)(4).<sup>5</sup>

24 \_\_\_\_\_  
25 <sup>5</sup> The unnumbered paragraph of Article XIII C, § 1(e) has no effect here. It was added by  
26 Proposition 26 and states:

27 The local government bears the burden of proving by a preponderance of the  
28 evidence that a levy, charge, or other exaction is not a tax, that the amount is no  
more than necessary to cover the reasonable costs of the governmental activity,  
(footnote continued)



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**c. Whether MWD’s Charges Meet A Separate Exception Under Section 1(e) Is Irrelevant**

Oddly, SDCWA alleges that MWD’s charges are for a “specific government service” and are, therefore, subject to the provision of Article XIII C, §1(e)(2). Pet./Compl., ¶ 56. Section 1(e)(2) is one of the other *exceptions* to taxes under Article XIII C and therefore is an exception to the application of Article XIII C’s voter approval requirements for taxes. MWD is not arguing this exception in this motion.<sup>6</sup>

**3. SDCWA Cannot Establish Its Article XIII C Claims As A Matter Of Law Because The Rates Were Approved By A Two-Thirds Vote**

Even assuming *arguendo* that MWD’s rates qualified as taxes that are subject to Article XIII C—which they do not for each of the separate reasons explained above—SDCWA cannot establish its Article XIII C claims as a matter of law. Taxes subject to Article XIII C do not violate that Article if two-thirds of the electorate approve them. Here, the rates were considered and approved by more than two-thirds of the relevant electorate, which is the member agencies through their representatives on MWD’s Board.

As to special taxes by local governments, Article XIII C provides:

and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor’s burdens on, or benefits received from, the government activity.

The requirement for proof that a charge does not exceed the reasonable costs of the government activity and is allocated based on a fair or reasonable relationship to the payor’s burdens mirrors requirements set forth in the exceptions stated in sections (e)(1) through (e)(3) of Article XIII C, § 1, which were also added by Proposition 26. In contrast, the exceptions stated in sections (e)(4) through (e)(7) contain no such requirements. All of section (e) must be read together, so that the requirements set out in the unnumbered paragraph can only be applicable to those exceptions that include the same standards. Where an exception to the definition of “tax” states no reasonable requirement (like section (e)(4)), there can be no reasonableness requirement nor a burden to prove this.

<sup>6</sup> While MWD qualifies for this exception too, it is not arguing it in this motion because unlike the section 1(e)(4) exception, the section 1(e)(2) exception includes a requirement that the charge “not exceed the reasonable costs.” That portion of the section 1(e)(2) exception requires resort to the administrative record, which the Court has advised it does not wish to do before the final hearing.

1 No local government may impose, extend, or increase any special tax unless and  
2 until that tax is submitted to the electorate and approved by a two-thirds vote.

3 Cal. Const. art. XIII C, § 2(d).

4 Under MWD's enabling act, the Legislature requires MWD to submit its rates to a vote of  
5 the representatives of its member agencies that comprise the Board of Directors. MWD Act § 57.  
6 MWD is required by this long-standing state law to adopt rates that pass by a majority vote. *Id.*  
7 SDCWA concedes that MWD's Board is comprised of representatives appointed by each of its 26  
8 member agencies, and that the Board has the authority to set the rates. Pet./Compl., ¶¶ 22-23.

9 On April 10, 2012, after public comment and votes on three other options (including a 3%  
10 increase option proposed by SDCWA), the proposed rates were submitted to the Board and the  
11 members voted. Minutes of the Regular Meeting of MWD Board of Directors (Apr. 10, 2012) at  
12 item 49026 (RJN, Ex. C); *see also*, Pet./Compl., ¶¶ 5, 48. The rates were approved by a 76%  
13 vote. *Id.*

14 MWD anticipates that SDCWA may argue that the representatives of the member agencies  
15 that comprise the MWD Board are not the "electorate."<sup>7</sup> "Electorate" is not defined in Article  
16 XIII C and it has not been interpreted by a court. However, the standard dictionary definition of  
17 the word, coupled with the MWD Act, make clear that the representatives on the Board are the  
18 only applicable electorate.

19 Webster's Dictionary defines "electorate" as "a body of people entitled to vote."  
20 Webster's New Collegiate Dictionary 371 (10th ed. 1996). The American Heritage Dictionary  
21 similarly defines the word as "a body of qualified voters." American Heritage Dictionary 881 (4th  
22 ed. 2000). Pursuant to the mandate of existing state law, the only body of people entitled to vote,  
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24 <sup>7</sup> If MWD were a retail water supplier rather than a wholesale water agency, its charges for water  
25 service would be a property related fee not subject to voter approval pursuant to Proposition 218.  
26 Cal. Const. art. XIII D, § 6(c). Ironically, SDCWA's potential position that millions of voters in  
27 MWD's service area must vote on MWD's water rates would impose more burdensome voter  
28 approval requirements on MWD as a wholesale supplier than are imposed on MWD's member  
agencies that provide retail water service directly to the public.

1 or qualified to vote, on MWD’s rates are the member agencies’ representatives on the Board.  
2 MWD Act § 57.

3 This makes sense because MWD is a wholesaler and its member agencies are the only ones  
4 who pay MWD’s rates. MWD Act §§ 130, 133. And, the legislative background text of  
5 Proposition 218 and Proposition 26 support the necessary conclusion that the electorate consists of  
6 those who directly pay the charge. For example, Proposition 218’s “Findings and Declarations”  
7 states that the “measure protects taxpayers by limiting the methods by which local governments  
8 exact revenue from taxpayers without their consent.” Ballot Pamp., General Elec. (November 5,  
9 1996), at 108 (RJN, Ex. B) (emphasis added). Similarly, Section 5 “Liberal Construction”  
10 describes the purpose of Proposition 218 as “limiting local government revenue and enhancing  
11 taxpayer consent.” RJN, Ex. B at 109 (emphasis added). The description of Proposition 26’s  
12 purposes use similar terms. The findings in section 1 of the measure complain about “new taxes  
13 to be paid by drivers, shoppers, and anyone who earns an income.” RJN, Ex. A at 114; *see also*  
14 Cal. Const. art. XIII D, § 4(e) & (g) (limiting voting on assessments to the record owners of each  
15 parcel to be assessed, with weighted voting based on the proportion of total financial obligation,  
16 and prohibiting voting by “electors residing within the district who do not own property”).

17 Furthermore, interpreting the electorate as anything other than MWD’s Board would  
18 effectively mean that Article XIII C repealed MWD Act § 57 by implication. This cannot be the  
19 case as it is well established that a subsequent law will not be found to have impliedly repealed a  
20 pre-existing, more specific law, absent legislative intent to do so. *See, e.g., People v. Super. Ct.*  
21 *(Cooper)*, 114 Cal. App. 4th 713, 720 (2003) (“In recognition of the courts’ constitutional role to  
22 construe, not write, statutes, all presumptions are against a repeal by implication.”) (internal  
23 quotation marks omitted); *Dorff*, 98 Cal. App. 3d 109, 114 (1979) (“the presumption is against  
24 [implied] repeal, especially where the prior statute has been generally understood and acted  
25 upon”).

26 Thus, even if SDCWA were able to prevail on every other aspect of its Article XIII C  
27 claims—which it cannot—as a matter of law, SDCWA can never prevail on its final required  
28 element: that the rates did not pass by a two-thirds vote of the electorate. SDCWA’s Article XIII

1 C claims therefore fail as a matter of law.

2 **III. CONCLUSION**

3 SDCWA's allegations and the judicially noticeable materials demonstrate as a matter of  
4 law that SDCWA's Article XIII C claims should be dismissed. For each of the separate reasons  
5 stated above, the Court should grant MWD's motion for judgment on the Article XIII C claims in  
6 all four causes of action.

7

8 DATED: July 29, 2013

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By: 

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Metropolitan Water District of Southern California

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