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EXEMPT FROM FILING FEES
[GOVERNMENT CODE § 6103]

15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
16 COUNTY OF SAN FRANCISCO

17 SAN DIEGO COUNTY WATER
18 AUTHORITY,

19 Petitioner and Plaintiff,

20 v.

21 METROPOLITAN WATER DISTRICT
22 OF SOUTHERN CALIFORNIA; et al.,

23 Respondents and
24 Defendants.

Case Nos. CPF-10-510830; CPF-12-512466

**RESPONDENT/DEFENDANT'S MOTION IN
LIMINE NO. 5**

**RESPONDENT/DEFENDANT
METROPOLITAN WATER DISTRICT OF
SOUTHERN CALIFORNIA'S NOTICE OF
MOTION AND MOTION TO EXCLUDE ALL
ARGUMENT FROM SDCWA AND IID
INCONSISTENT WITH PRIOR JUDICIAL
ADMISSION THAT THE WHEELING
STATUTE DOES NOT APPLY TO THE
EXCHANGE AGREEMENT**

25 Date: November 4, 2013
26 Time: 9:00 a.m.
27 Dept.: 304
28 Judge: Hon. Curtis E. A. Karnow

Actions Filed: June 11, 2010; June 8, 2012
Trial Date: December 17, 2013

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1 **NOTICE OF MOTION AND MOTION IN LIMINE NO. 5**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

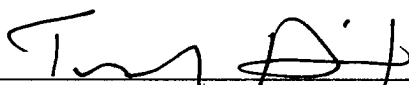
3 PLEASE TAKE NOTICE that on November 4, at 9:00 A.M., or as soon thereafter as the
4 matter may be heard, in Department 304 of the Superior Court of California, County of San
5 Francisco, located at 400 McAllister St., San Francisco, California, 94102, Respondent and
6 Defendant Metropolitan Water District of Southern California will and hereby does move the
7 Court for an order in limine to exclude all evidence or argument from San Diego County Water
8 Authority and Imperial Irrigation District in the final hearing/trial in both the *2010 Action* (Case
9 No. CPF-10-510830) and the *2012 Action* (Case No. CPF-12-512466) that the Wheeling Statute
10 (California Water Code §§ 1810-14) applies to the 2003 Amended and Restated Agreement
11 between the Metropolitan Water District of Southern California and the San Diego County Water
12 Authority for the Exchange of Water (“Exchange Agreement”), including but not limited to that
13 the Exchange Agreement is a wheeling agreement or that the price of water exchanged under the
14 Exchange Agreement violates the Wheeling Statute.

15 This motion is made on the ground that the doctrine of judicial estoppel bars SDCWA
16 and IID from offering argument that directly contradicts a position they have taken in prior
17 litigation. *See Int’l Engine Parts, Inc. v. Feddersen & Co.*, 64 Cal. App. 4th 345, 350 (1998);
18 *Jackson v. County of Los Angeles*, 60 Cal. App. 4th 171, 181 (1997).

19 This motion will be and hereby is based on this Notice, the Memorandum of Points and
20 Authorities in support thereof filed herewith, the Declaration of Thomas S. Hixson in Support of
21 Metropolitan Water District of California’s Motions in Limine filed herewith, all pleadings and
22 papers on file in this action, and such argument as may be presented at the hearing.

1 DATED: October 18, 2013

Bingham McCutchen LLP

2
3 By: 
4 Thomas S. Hixson
5 Attorneys for Respondent and Defendant
6 Metropolitan Water District of Southern
7 California
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Respondent and Defendant Metropolitan Water District of Southern California (“MWD”)
3 respectfully submits this motion in limine to exclude all evidence or argument from San Diego
4 County Water Authority (“SDCWA”) and Imperial Irrigation District (“IID”) in the final
5 hearing/trial in both the *2010 Action* (Case No. CPF-10-510830) and the *2012 Action* (Case No.
6 CPF-12-512466) that the Wheeling Statute (California Water Code §§ 1810-14) applies to the
7 2003 Amended and Restated Agreement between MWD and SDCWA for the Exchange of
8 Water (“Exchange Agreement”), including but not limited to that the Exchange Agreement is a
9 wheeling agreement or that the price of water exchanged under the Exchange Agreement violates
10 the Wheeling Statute.

11 **I. INTRODUCTION**

12 In recent years including 2011, SDCWA, IID, and MWD jointly argued before the
13 Sacramento Superior Court and the California Court of Appeal that the Exchange Agreement
14 between SDCWA and MWD is not a wheeling agreement and is not subject to the Wheeling
15 Statute. SDCWA and IID also argued these facts in proceedings before the California State
16 Water Resources Control Board. SDCWA now contends the opposite in these actions, and
17 perhaps IID (which is aligned in these actions with SDCWA) will as well.

18 This kind of opportunistic flip-flopping is not permitted in California courts. A party
19 cannot assert a position before one judge and then turn around and assert exactly the opposite
20 position before a different judge. That behavior is, in the words of the California Court of
21 Appeal, “patently wrong . . . [an] abuse [of] the judicial process.” *Jackson v. County of Los*
22 *Angeles*, 60 Cal. App. 4th 171, 181 (1997). It is not just litigants who are disadvantaged by an
23 opposing party’s inconsistent assertions: “the integrity of the judicial process is threatened when
24 a litigant is permitted to gain an advantage by the manipulative assertion of inconsistent
25 positions, factual or legal.” *Levin v. Ligon*, 140 Cal. App. 4th 1456, 1469 (2006) (citing *Helfand*
26 *v. Gerson*, 105 F.3d 530, 535 (9th Cir. 1997)).

27 Having argued before the Hon. Roland L. Candee (Sacramento Superior Court), the
28 California Court of Appeal, and the State Water Resources Control Board that water exchanged

1 under the Exchange Agreement is not “wheeled” water and the Wheeling Statute does not apply,
2 SDCWA and IID cannot now argue that the water *is* wheeled and the Wheeling Statute *does*
3 apply. This change in position by SDCWA and IID at the final hearing/trial, if permitted, would
4 “compromise the integrity of the administration of justice by creating a risk of conflicting
5 judicial determinations” and should be excluded from these proceedings. *Id.*

6 **II. FACTUAL SUMMARY**

7 **A. In These Actions, SDCWA Asserts that the Price It Pays for Water under the**
8 **Exchange Agreement Violates the Wheeling Statute**

9 In both the *2010* and *2012 Actions*, SDCWA alleges that MWD’s water rates adopted in
10 April 2010 and April 2012 violate the Wheeling Statute. SDCWA has never clearly explained its
11 claim under the Wheeling Statute; however, both the 2010 Third Amended Petition/Complaint
12 (“TAC”) and the 2012 Petition/Complaint (“2012 Complaint”) appear to suggest that SDCWA’s
13 allegation encompasses the price of water exchanged under the Exchange Agreement. Paragraph
14 72 of SDCWA’s TAC reads:

15
16 Metropolitan also is under a clear and present duty, imposed by the
17 Wheeling Statutes (Water Code § 1810 et seq.) to charge only “fair
18 compensation” for the conveyance, or “wheeling,” of water
19 through Metropolitan’s facilities. *In addition to the*
20 *Transportation Agreement*,¹ which requires that Metropolitan
21 transport IID Water and Canal Lining Water at rates equal to
22 Metropolitan’s rates set “pursuant to applicable law and regulation
23 and generally applicable as to the conveyance of water by
24 Metropolitan,” the Water Authority has contracted in the past, and
25 intends to contract with Metropolitan in the future, for “wheeling”
26 of water from third-party sources not covered by the
27 Transportation Agreement.
28

23 ¹ In both of its Petitions/Complaints, SDCWA incorrectly refers to the Exchange Agreement as
24 the “Transportation Agreement.” In the paragraphs quoted above from the TAC and 2012
25 Petition/Complaint, SDCWA uses the words “in addition to” and “above and beyond” because
26 completely independent of the Exchange Agreement (which is not a wheeling agreement),
27 SDCWA has in the past wheeled water through MWD’s system. MWD explained this in its May
28 27, 2011 Initial Disclosures filed in the *2010 Action*, noting that SDCWA has in the past paid a
wheeling rate, and then explaining on page 19 that the Exchange Agreement is not a wheeling
transaction: “SDCWA purchases this water from IID, provides that water to Metropolitan, then
receives a quantity of Exchange Water in return. . . . The Exchange Water is a varying mix of
water from all of Metropolitan’s sources of supply . . .”

1 TAC ¶ 72 (emphasis added). Similarly, Paragraph 73 of SDCWA’s 2012 Complaint states:

2 Metropolitan also is under a clear and present duty, imposed by the
3 Wheeling Statutes (Water Code § 1810 *et seq.*) to charge only “fair
4 compensation” for the conveyance, or “wheeling,” of water
5 through Metropolitan's facilities. *Above and beyond the*
6 *Transportation Agreement*, which requires that Metropolitan
7 transport IID Water and Canal Lining Water at a price equal to
8 Metropolitan's rates set “pursuant to applicable law and regulation
9 and generally applicable to the conveyance of water by
10 Metropolitan,” the Water Authority has previously engaged, in the
11 past, and intends to engage in the future, in “wheeling” of water
12 from third-party sources through Metropolitan's facilities.
13 (Emphasis added).

9 2012 Complaint, ¶ 73 (emphasis added).

10 On May 21, 2013, MWD asked SDCWA to clarify its position via special interrogatory.
11 SDCWA confirmed that it is indeed alleging that “the rate [MWD] charges SDCWA under the
12 Exchange Agreement is for ‘wheeled’ water . . . , *and that its authority for setting such a rate*
13 *depends on, and is therefore constrained by, the Wheeling Statutes*” Declaration of
14 Thomas S. Hixson (“Hixson Decl.”) ¶ 2 and Exhibit A, p. 18 (emphasis added).

15 **B. SDCWA and IID Take a Contradictory Position in Proceedings Before the**
16 **State Water Resources Control Board**

17 In 2002, SDCWA and IID jointly petitioned the State Water Resources Control Board
18 (“Water Board”) to approve an agreement providing for a long-term transfer of conserved water
19 from IID to SDCWA. In support of the joint petition, SDCWA General Manager Maureen
20 Stapleton testified in a public hearing that the Exchange Agreement is *not* a wheeling agreement:

21 The exchange agreement . . . requires that San Diego basically turn
22 over an amount of water to Metropolitan at its intake on the
23 Colorado River and then alike amount [sic], meaning just that
24 same amount in quantity, would be provided to us at our turnout at
25 the end of the Met pipes in San Diego County. *It is radically*
different than a wheeling agreement for a space available in that
we have a firm space in the aqueduct for the length of the
exchange agreement.

26 Hixson Decl. ¶ 3 and Exhibit B, p. 438 (emphasis added). Ms. Stapleton then confirmed that
27 water purchased under the Exchange Agreement “is different from a Katz Wheeling Law transfer
28 in two regards. One is it is a trade of one supply of water for another. And secondly, it is firm

1 capacity as opposed to space available[.]” *Id.* at 438-39.

2 Based in part on Ms. Stapleton’s testimony, the Water Board approved SDCWA’s and
3 IID’s petition on October 28, 2002. Hixson Decl. ¶ 4 and Exhibit C.

4 **C. SDCWA and IID Continue to Argue that the Exchange Agreement Is Not a**
5 **Wheeling Agreement, and the Wheeling Statute Does Not Apply to the**
6 **Exchange Agreement, to the Sacramento Superior Court and the Court of**
7 **Appeal in the Quantification Settlement Agreement Litigation**

8 The agreement that was the subject of SDCWA’s and IID’s joint petition to the Water
9 Board was subsequently one of several agreements challenged in the Quantification Settlement
10 Agreement Litigation (“QSA Litigation”), a coordinated proceeding in the Sacramento Superior
11 Court to determine the validity of agreements that provide for the conservation, transfer, and
12 exchange of Colorado River water, which was then considered by the Court of Appeal. These
13 agreements quantify the amount of water that IID and others are permitted to divert annually
14 from the Colorado River. In the QSA Litigation, Imperial County argued that the proposed
15 transfers violated the Wheeling Statute because the County had not determined them to be
16 environmentally and economically acceptable. *See In re Quantification Settlement Agreement*
17 *Cases*, 201 Cal. App. 4th 758, 839 (2011). In response, SDCWA and IID explicitly took the
18 position that the Wheeling Statute does not apply to the Exchange Agreement.

19 In a Joint Motion for Summary Adjudication of claims brought against them under the
20 Wheeling Statute, SDCWA and MWD together argued that “the MWD-SDCWA Exchange
21 Agreement falls outside the scope of the Wheeling Law and thus the agreement cannot be
22 invalidated by it, nor can any duties under it be breached” Hixson Decl. ¶ 5 and Exhibit D,
23 p. 20. The Joint Motion explained in detail that

24 *[t]he Wheeling Law does not apply to the MWD-SDCWA*
25 *Exchange Agreement [T]he MWD-SDCWA Exchange*
26 *Agreement provides SDCWA no right to use unused capacity of*
27 *particular MWD facilities as would occur under the Wheeling*
28 *Law, but contractually obligates MWD to exchange SDCWA’s*
water or provide like quantities of water through whatever
facilities it sees fit.

29 *Id.* at pp. 21-22 (emphasis added). For that reason, SDCWA and MWD contended that “the
30 parties’ actions under the Exchange Agreement are governed by the contract between the parties

1 *and not limitations under the Wheeling Law.” Id.* at 22 (emphasis added).

2 In addition, IID filed an amicus brief in support of SDCWA and MWD’s Joint Motion
3 which similarly contended that the Wheeling Statute is inapplicable to the Exchange Agreement.
4 IID explained that “wheeling is the *actual conveyance of transferred water through a third*
5 *party’s conveyance facility* However, the Exchange Agreement . . . is not a wheeling
6 agreement. No water is conveyed from IID to SDCWA through MWD’s conveyance facilities.
7 Rather, MWD simply takes IID’s conserved water and then makes water available to SDCWA
8 from any source, through any conveyance facility it wishes, all as part of an exchange
9 arrangement. Thus, the Wheeling Law can have no effect.” Hixson Decl. ¶ 6 and Exhibit E,
10 pp. 1-2.²

11 The Sacramento Superior Court granted SDCWA and MWD’s Joint Motion in the QSA
12 Litigation. The Court explained that “[t]he Court must evaluate whether the Wheeling Statutes
13 apply based upon the language and legislative history of the Wheeling Statutes.” Hixson Decl. ¶
14 7 and Exhibit F, p. 5. Factually, the Court stated that “[t]he agreement addressing how water
15 will be physically provided to SDCWA is the MWD-SDCWA Exchange Agreement.” *Id.*
16 Accordingly, the Court concluded that the wheeling claim “effectively challenges the MWD-
17 SDCWA Exchange Agreement.” *Id.*

18 The Court then granted the Joint Motion on two grounds. First, the Court held that “the
19 MWD-SDCWA Exchange Agreement has been validated by operation of law.” *Id.* Second, the
20 Court held that the Wheeling Statutes were in any event not implicated: “Section 1810(d) [a
21 provision of the Wheeling Statute] does not have independent application to transfers,
22 exchanges, sales or leases of water where no use of facilities as otherwise addressed in the
23 Wheeling Statutes (‘[t]his use of a water conveyance facility’) is involved.” *Id.*

24 SDCWA and IID repeated their argument in briefing to the California Court of Appeal in
25 2011 (during the pendency of the *2010 Action* here). In their joint appellate brief, SDCWA and

26 _____
27 ² In this litigation, thus far, IID has continued to agree that the Exchange Agreement involves no
28 actual conveyance of water. *See* IID May 21, 2012 Answer in the *2010 Action*, ¶ 2; IID July 24,
2013 Answer in the *2012 Action*, ¶ 3.

1 MWD devoted several pages to the argument that “the Exchange Agreement and the Transfer
2 Agreements are clear on their faces that they do not pertain to the forced use of unused capacity
3 in the water conveyance system of an agency, and thus do not trigger application of the
4 Wheeling Statutes.” Hixson Decl., ¶ 9 and Exhibit H, p. 154. IID echoed SDCWA’s argument
5 in its own brief, writing “the transaction which MWD and SDCWA memorialized in their
6 MWD-SDCWA Amended Exchange Agreement . . . is not one that is governed by the Wheeling
7 Law. No wheeling is taking place. A comparison of the statutory scheme and the MWD-
8 SDCWA Amended Exchange Agreement demonstrates this.” Hixson Decl., ¶ 10 and Exhibit I,
9 p. 71. IID also offered its own interpretation of SDCWA’s position, noting that “SDCWA and
10 MWD do not describe their MWD-SDCWA Amended Exchange Agreement as a wheeling
11 arrangement.” *Id.* at p. 75.

12 The Court of Appeal affirmed the trial court’s granting of the Joint Motion on the
13 wheeling claim, albeit on a different ground, namely, that the county of origin’s approval was not
14 required by the Wheeling Statute. *In re Quantification Settlement Agreement Cases*, 201 Cal.
15 App. 4th at 842 (“Because the County’s cause of action for violation of the wheeling statutes is
16 based on a premise that is unsupported by the terms of those statutes, we find no error in the trial
17 court’s grant of summary adjudication against the County of that cause of action.”).

18 **III. ARGUMENT**

19 Judicial estoppel—“sometimes referred to as the doctrine of preclusion of inconsistent
20 positions”—protects the integrity of the judicial process by preventing a party from asserting a
21 position in a legal proceeding that is contrary to a position taken in an earlier proceeding.
22 *Jackson*, 60 Cal. App. 4th at 102. The California Court of Appeal recognizes such opportunism
23 as an “abuse [of] the judicial process,” and courts regularly invoke judicial estoppel “to protect
24 against a litigant playing fast and loose with the courts.” *Id.* (internal quotations and citation
25 omitted). Stated simply, “[o]ne to whom two inconsistent courses of action are open and who
26 elects to pursue one of them is afterward precluded from pursuing the other.” *Id.* at 182 (quoting
27 *Schulze v. Schulze*, 121 Cal. App. 2d 75, 83 (1953)). The doctrine applies when a party asserts
28 incompatible positions within a single proceeding, but it is “especially appropriate where a party

1 has taken inconsistent positions in separate proceedings” because the court cannot easily monitor
2 or evaluate shifts in the party’s position. *Id.*

3 **A. All of the Elements for Judicial Estoppel are Satisfied**

4 The doctrine of judicial estoppel applies to bar a party from asserting an inconsistent
5 position when:

6 (1) the same party has taken two positions; (2) the positions were
7 taken in judicial or quasi-judicial administrative proceedings; (3)
8 the party was successful in asserting the first position (i.e., the
9 tribunal adopted the position or accepted it as true); (4) the two
positions are totally inconsistent; and (5) the first position was not
taken as a result of ignorance, fraud, or mistake.

10 *Id.* at 183. Each of these elements is easily satisfied.

11 1. The Same Party Has Taken Two Positions

12 The first element of judicial estoppel requires that the same party take two positions.
13 SDCWA and IID argued in the QSA Litigation, and asserted via SDCWA’s General Manager at
14 a state public hearing, that the price under the Exchange Agreement is not subject to the
15 Wheeling Statute. Now, SDCWA asserts that the price under the Exchange Agreement *is* subject
16 to the Wheeling Statute. *See supra.* SDCWA has therefore taken two different positions, and
17 the first element of judicial estoppel is satisfied. Since IID is aligned with SDCWA in these
18 actions, IID could do the same.

19 2. SDCWA and IID Took the Positions In Judicial or Quasi-Judicial
20 Proceedings

21 The second element of judicial estoppel requires that the party take the two positions in
22 judicial or quasi-judicial proceedings. Judicial estoppel is “especially appropriate” where, as
23 here, a party has taken inconsistent positions in separate proceedings. *Jackson*, 60 Cal. App. 4th
24 at 181.

25 Here, SDCWA and IID asserted their first position in *both* judicial and quasi-judicial
26 proceedings, then SDCWA asserted its second position before this Court. First, SDCWA’s
27 General Manager asserted the first position in testimony before the Water Board, which IID
28 joined. *See People ex rel. Sneddon v. Torch Energy Serv., Inc.*, 102 Cal. App. 4th 181, 189

1 (2002) (“The prior inconsistent assertion need not be made to a court of law. Statements to
2 administrative agencies may also give rise to judicial estoppel.”). Later, SDCWA and IID
3 argued their first position in briefing before the Sacramento Superior Court and the Court of
4 Appeal in the QSA Litigation. *See supra*. Because SDCWA has taken its two positions in both
5 judicial and quasi-judicial proceedings (and IID might), the second element of judicial estoppel
6 is satisfied.

7 3. SDCWA and IID Were Successful in Asserting the First Position

8 The third element of judicial estoppel requires that the party be successful in asserting its
9 first position. As noted above, SDCWA and IID were successful in asserting their position in
10 both judicial and quasi-judicial settings: the Water Board approved their joint petition, the
11 Sacramento Superior Court granted SDCWA and MWD’s Joint Motion in the QSA Litigation
12 which IID had supported in an amicus brief, and the Court of Appeal upheld that decision. Thus,
13 the third element of judicial estoppel is satisfied.

14 To the extent SDCWA or IID may argue that judicial estoppel should not bar either from
15 asserting inconsistent positions because the Sacramento Superior Court reached the decision only
16 in dicta, that argument must fail. Relevant case law does not distinguish between dicta and
17 holding, and in any event, the doctrine of judicial estoppel is not so rigid, particularly with
18 respect to this third element. In *Drain v. Betz Laboratories*, 69 Cal. App. 4th 950 (1999), the
19 plaintiff attested to certain facts in a worker’s compensation claim, then asserted contradictory
20 facts in subsequent litigation. The worker’s compensation claim had been accepted by a referee
21 in the earlier case, but “no factual findings were incorporated in the referee’s approval of the
22 parties’ compromise and release” *Id.* at 958. However, “that [was] not fatal” to the
23 respondents’ judicial estoppel defense. *Id.* Reasoning that “circumstances may warrant
24 application of the doctrine *even if the earlier position was not adopted* by the tribunal,” the
25 Court found that a tribunal’s implicit adoption of the earlier position would surely satisfy the
26 third element. *Id.* (emphasis added) (citing *Jackson*, 60 Cal. App. 4th at 184, n. 8.); *see also*
27 *Thomas v. Gordon*, 85 Cal. App. 4th 113, 118-19 (2000) (applying judicial estoppel “even absent
28 proof of success in the earlier litigation.”). Here, far from “not adopting” SDCWA’s and IID’s

1 prior position, the Sacramento Superior Court accepted it, and that decision was upheld on
2 appeal. SDCWA and IID were clearly successful in asserting their first position.

3 4. The Two Positions are Totally Inconsistent

4 The fourth element of judicial estoppel requires that the two positions taken by the party
5 must be totally inconsistent. Here, the issue is binary; either the Wheeling Statute applies to the
6 price for the exchange of water under the Exchange Agreement, or it does not. SDCWA and IID
7 took the position in the QSA Litigation and in the April 24, 2002 Public Hearing that the
8 Wheeling Statute does not apply. Today, SDCWA takes the position that the Wheeling Statute
9 does apply. IID may do the same. There is no middle ground between these two opposing
10 positions. Further, SDCWA and IID can point to no intervening events between 2011 and the
11 present that would account for SDCWA and IID changing their position. The stated rationale
12 supporting SDCWA's and IID's position in the QSA Litigation—that the Wheeling Statute does
13 not apply because the water exchanged under the Exchange Agreement is not actually conveyed
14 through MWD's transportation system—is as true today as it was in 2011. The basic functioning
15 of the Exchange Agreement has not changed, nor have there been any relevant amendments to
16 the Wheeling Statute in the intervening years. For these reasons, SDCWA's two positions (and
17 IID's two positions if it joins with SDCWA in its argument in this Court) are totally inconsistent
18 and the fourth element of judicial estoppel is satisfied.

19 5. The First Position Was Not Taken As A Result Of Ignorance, Fraud, Or Mistake

20 The fifth and final element of judicial estoppel requires that the party's first position was
21 not taken as a result of ignorance, fraud, or mistake. There is no question that SDCWA was fully
22 informed of its position in the QSA Litigation. SDCWA is a sophisticated agency comprised of
23 experienced professionals who have worked within the confines of applicable California water
24 laws since SDCWA's founding in 1944. The portion of MWD's and SDCWA's Joint Motion
25 asserting that the Wheeling Statute does not apply to the Exchange Agreement is lengthy and
26 detailed. It clearly explains both the position and the rationale underlying that position. It is
27 entirely consistent with the comments made by SDCWA General Manager Maureen Stapleton at
28 a public hearing held shortly before the QSA Litigation commenced. IID agreed in its amicus

1 brief supporting MWD's and SDCWA's Joint Motion that the Wheeling Statute does not apply
2 to the Exchange Agreement. After winning the issue in the trial court, both SDCWA and IID
3 defended their position in their appellate briefs. *See supra*. There is no realistic possibility that
4 SDCWA and IID were not aware of the argument they made both before the State Board and in
5 the QSA Litigation.

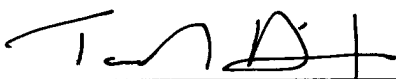
6 Against this backdrop, SDCWA asserts exactly the opposite position in this litigation
7 (and IID may join it in doing so). Courts have not hesitated to bar a plaintiff's position based on
8 the doctrine of judicial estoppel when the above elements have been satisfied, and this Court
9 should not hesitate to do so here. *See, e.g., Levin*, 140 Cal. App. 4th at 1483-85; *Drain*, 69 Cal.
10 App. 4th at 959; *International Engine Parts, Inc. v. Feddersen and Company*, 64 Cal. App. 4th at
11 345 (1998); *Jackson*, 60 Cal. App. 4th at 181.

12 **IV. CONCLUSION**

13 For the foregoing reasons, the Court should exclude any evidence or argument from
14 SDCWA and IID that the Wheeling Statute applies to the Exchange Agreement.

15 DATED: October 18, 2013

Bingham McCutchen LLP

17
18 By: 
19 _____
20 Thomas S. Hixson
21 Attorneys for Respondent and Defendant
22 Metropolitan Water District of Southern
23 California
24
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4 **PROOF OF SERVICE**

5 I am over eighteen years of age, not a party in this action, and employed in San
6 Francisco County, California at Three Embarcadero Center, San Francisco, California 94111-
7 4067. I am readily familiar with the practice of this office for collection and processing of
8 correspondence for mail/fax/hand delivery/next business day Federal Express delivery, and they
9 are deposited that same day in the ordinary course of business.

10 On October 18, 2013, I served the attached:

11 **RESPONDENT/DEFENDANT'S MOTION IN LIMINE NO. 5**

12 **RESPONDENT/DEFENDANT METROPOLITAN WATER DISTRICT OF**
13 **SOUTHERN CALIFORNIA'S NOTICE OF MOTION AND MOTION TO**
14 **EXCLUDE ALL ARGUMENT FROM SDCWA AND IID INCONSISTENT**
15 **WITH PRIOR JUDICIAL ADMISSION THAT THE WHEELING**
16 **STATUTE DOES NOT APPLY TO THE EXCHANGE AGREEMENT**



18 (VIA LEXISNEXIS) by causing a true and correct copy of the document(s) listed
19 above to be sent via electronic transmission through LexisNexis File & Serve to
20 the person(s) at the address(es) set forth below.

21 as indicated on the following **Service List**.

22 I declare under penalty of perjury under the laws of the State of California that the
23 foregoing is true and correct and that this declaration was executed on October 18, 2013, at San
24 Francisco, California.

25
26
27
28 
Kelley A. Garcia

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