

1 MORGAN LEWIS & BOCKIUS LLP
Colin C. West (Bar No. 184095)
2 Thomas S. Hixson (Bar No. 193033)
Three Embarcadero Center
3 San Francisco, California 94111-4067
Telephone: (415) 393-2000
4 Facsimile: (415) 393-2286

5 QUINN EMANUEL URQUHART & SULLIVAN, LLP
John B. Quinn (Bar No. 090378)
6 Eric J. Emanuel (Bar No. 102187)
865 South Figueroa Street, 10th Floor
7 Los Angeles, California 90017-2543
Telephone: (213) 443-3000
8 Facsimile: (213) 443-3100

9 THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA
Marcia Scully (Bar No. 80648)
10 Heather C. Beatty (Bar No. 161907)
Joseph Vanderhorst (Bar No. 106441)
11 John D. Schlotterbeck (Bar No. 169263)
700 North Alameda Street
12 Los Angeles, California 90012-2944
Telephone: (213) 217-6000
13 Facsimile: (213) 217-6980

14 Attorneys for Respondent and Defendant
Metropolitan Water District of Southern
15 California

16 SUPERIOR COURT OF THE STATE OF CALIFORNIA
17 FOR THE COUNTY OF SAN FRANCISCO

18 SAN DIEGO COUNTY WATER
19 AUTHORITY,

20 Petitioner and Plaintiff,

21 vs.

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

26 Respondents and Defendants.

Case No. CPF-10-510830
Case No. CPF-12-512466

**METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA'S
SUPPLEMENTAL MEMORANDUM OF
POINTS AND AUTHORITIES RE
PREFERENTIAL RIGHTS**

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

Trial: Completed

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

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

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT..... 1

ARGUMENT..... 2

I. SECTIONS 4.1 AND 4.2 DO NOT SUPPORT SDCWA’S PREFERENTIAL RIGHTS CLAIM..... 2

 A. Even If Preferential Rights Were a MWD “Plan,” Section 4.1 Does Not Help SDCWA..... 2

 B. SDCWA’s Argument Ignored the Exception in Section 4.1, Which Makes Clear that SDCWA Is Paying for MWD Water, and Purchases of Water Are Excluded from Preferential Rights..... 3

II. THE EXCHANGE AGREEMENT’S PROVISIONS ARE CONSISTENT WITH THE LAW ON PREFERENTIAL RIGHTS AND LONG-STANDING PRACTICE..... 4

 A. SDCWA’s Payments Are Water Rates, Which Are Excluded from Preferential Rights..... 4

 B. SDCWA Knew When It Entered into the 2003 Exchange Agreement that MWD Excluded Payment of Volumetric Water Rates from Preferential Rights 5

CONCLUSION..... 5

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

TABLE OF AUTHORITIES

Page

Cases

San Diego Cnty. Water Auth. v. Metro. Water Dist. of S. Cal.,
117 Cal. App. 4th 13 (2004).....1, 4, 5

Statutes

MWD Act § 135.....1, 2, 4

Other Authorities

MWD Admin. Code § 44022, 3
MWD Admin. Code §§ 4900 *et seq.*4

1 **PRELIMINARY STATEMENT**

2 SDCWA has argued that Section 4.1 of the Exchange Agreement applies to the
3 determination of preferential rights. Yet nothing in that section, nor elsewhere in the Exchange
4 Agreement, states or means that payments under the agreement are to be included in the
5 preferential rights calculation. First, Section 4.1 concerns only “*Metropolitan’s* ordinances, plans,
6 programs, rules and regulations.” Preferential rights are none of those; they are governed by state
7 statute.

8 Second, Section 4.1 provides only that certain water under the Exchange Agreement will
9 be treated “in the same manner as the Local Water of other Metropolitan member agencies.” No
10 payments by member agencies for Local Water are included in the preferential rights calculation.

11 In addition, SDCWA has ignored the exception stated in Section 4.1. That section ends
12 with the clause “except as provided in Paragraphs 4.2 and 5.2.” Section 4.2 provides that
13 Exchange Water “shall be characterized as Metropolitan water and not as Local Water only for the
14 limited purposes of Paragraph 5.2.” Section 5.2 is the payment provision, specifying the amount
15 SDCWA must pay for the Exchange Water that MWD delivers. SDCWA is paying for MWD
16 water. By statute, purchases of water are excluded from the preferential rights calculation.

17 Preferential rights are governed by Section 135 of the Metropolitan Water District Act
18 (“MWD Act”). The Court of Appeal construed the meaning of Section 135 in *San Diego County*
19 *Water Authority v. Metropolitan Water District of Southern California*, 117 Cal. App. 4th 13
20 (2004), holding that Section 135 exclusively governs the determination of preferential rights, *id.* at
21 24, and further holding that MWD’s interpretation and implementation of that statute – and any
22 section of its enabling Act – is entitled to great deference,¹ *id.* at 22. Because the parties agreed
23 that the water SDCWA pays for under Section 5.2 is Metropolitan water, the Exchange Agreement
24 has made SDCWA’s payments for the purchase of water, which are accordingly excluded from the
25 preferential rights calculation.

26 _____
27 ¹ This Court has likewise ruled that it “should afford great weight to Metropolitan’s
28 interpretation of its implementing statute” Nov. 5, 2013 Order at 24.

1 ARGUMENT

2 **I. SECTIONS 4.1 AND 4.2 DO NOT SUPPORT SDCWA’S PREFERENTIAL**
3 **RIGHTS CLAIM**

4 SDCWA has argued that Exchange Water is “Local Water” under Section 4.1. Trial Tr.
5 2009:8-2010:8. In its oral argument SDCWA did not, however, explain how this section logically
6 leads to the conclusion that payments under the Exchange Agreement are to be included in the
7 preferential rights calculation. In any event, it suffers two fatal flaws: Local Water has nothing to
8 do with preferential rights, and Section 4.1 has an exception that makes clear that SDCWA is not
9 paying for Local Water but instead for MWD water.

10 **A. Even If Preferential Rights Were a MWD “Plan,” Section 4.1 Does Not Help**
11 **SDCWA**

12 Section 4.1 of the Exchange Agreement provides:

13 4.1 Exchange Water as an Independent Local Supply. The Exchange Water
14 shall be characterized *for the purposes of all of Metropolitan’s ordinances, plans,*
15 *programs, rules and regulations,* including any then-effective Drought
16 Management Plan, and for calculation of any Readiness-to-Serve Charge share, in
the same manner as the Local Water of other Metropolitan member agencies,
except as provided in Paragraphs 4.2 and 5.2.

17 *Id.* (emphasis added).

18 Preferential rights are not one of “Metropolitan’s ordinances, plans, programs, rules and
19 regulations.”² Preferential rights were established by the state Legislature in Section 135 of the
20 MWD Act. SDCWA’s person most knowledgeable on preferential rights, Dennis Cushman,
21 conceded that preferential rights are “a statutory right embodied in the Metropolitan Water District

22
23 ² The reference in Section 4.1 to “any . . . Drought Management Plan” is not a reference to
24 preferential rights. Drought Management Plans are created and established by MWD’s Board of
25 Directors, and are implemented in the event of serious droughts. See MWD’s First Amended
26 Answer to Third Amended Complaint at ¶ 23(j). Preferential rights concern each member
27 agency’s “right to purchase . . . a portion of the water served by the district,” regardless of a water
28 shortage or any other circumstance. MWD Act § 135; see also Cushman 1020:14-18; Skillman
1846:19-25. Likewise, Section 4.1’s other example, the Readiness-to-Serve Charge, is a charge to
member agencies created and established by the MWD Board. MWD Admin. Code § 4402.

1 Act itself” and the calculations are made under that statute. Cushman 1019:20-1020:13; *see also*
2 Skillman 1846: 6-12.

3 Section 4.1 provides that “Exchange Water shall be characterized . . . in the same manner
4 as the Local Water of other Metropolitan member agencies”³ This provision is of no
5 assistance to SDCWA because *no* payments by member agencies for Local Water are included in
6 the preferential rights calculation. The only payments by member agencies that MWD includes in
7 the preferential rights calculation are property taxes, two fixed charges (the Readiness-to-Service
8 Charge and the Capacity Charge), and revenue from the construction of service connections.
9 Skillman 1847:5-15. All member agencies are treated the same: MWD includes in the calculation
10 these same four components – and excludes all other payments – for all member agencies.
11 Skillman 1848:2-16.

12 Consequently, even if preferential rights were a MWD “ordinance, plan, program, rule or
13 regulation,” the Exchange Agreement would merely require MWD to treat SDCWA the same as
14 all other member agencies, which it does. Conversely, if MWD were to include SDCWA’s
15 Exchange Agreement payments in the preferential rights calculation, MWD would be treating
16 SDCWA differently from, and better than, the other member agencies, in violation of Section 4.1.

17 **B. SDCWA’s Argument Ignored the Exception in Section 4.1, Which Makes**
18 **Clear that SDCWA Is Paying for MWD Water, and Purchases of Water Are**
Excluded from Preferential Rights

19 In SDCWA’s closing argument, it cited Section 4.1 but failed to discuss the last clause:
20 “Exchange Water shall be characterized . . . in the same manner as the Local Water of other
21 Metropolitan member agencies, *except as provided in Paragraphs 4.2 and 5.2.*” § 4.1 (emphasis
22

23 ³ The Exchange Agreement defines “Local Water” as “water supplies not served by
24 [MWD],” such as ground water and recycled water, that are “acquired, owned or produced by
25 local agencies.” § 1.1(q). Characterizing Exchange Water as Local Water for certain purposes
26 means, for example, that SDCWA has water that is not subject to a drought allocation plan. *See*
27 MWD’s First Amended Answer to Third Amended Complaint at ¶ 23(b)(vii). It also means
28 SDCWA pays a lower Readiness-to-Serve Charge, since that fixed charge is based on a ten-year
rolling average of each member agency’s purchases of MWD water. *See id.* at ¶ 23(b)(vi); MWD
Admin. Code § 4402.

1 added). Section 4.2, in turn, provides that Exchange Water shall be characterized as “Metropolitan
2 water” for purposes of Section 5.2:

3 4.2 Exception for Interim Agricultural Water Program and Determination of
4 Price. Notwithstanding the provisions of Paragraph 4.1, *the Exchange Water*
5 *delivered to SDCWA shall be characterized as Metropolitan water* and not as Local
6 Water only for the limited purposes of Paragraph 5.2 and the Interim Agricultural
7 Water Program.

6 *Id.* (emphasis added).

7 Section 5.2 is the price provision. Therefore, when Section 4.2 (characterizing the water as
8 MWD water for purposes of Section 5.2) is read together with Section 5.2 (the price of the water),
9 the two sections provide that SDCWA is paying for MWD water; in other words, the purchase of
10 water.⁴ The preferential rights statute *expressly excludes payments for the “purchase of water.”*
11 MWD Act § 135 (emphasis added). Thus, Sections 4.2 and 5.2 collectively establish that
12 SDCWA is paying for MWD water, which the statute requires MWD to exclude.⁵

13 **II. THE EXCHANGE AGREEMENT’S PROVISIONS ARE CONSISTENT WITH**
14 **THE LAW ON PREFERENTIAL RIGHTS AND LONG-STANDING PRACTICE**

15 **A. SDCWA’s Payments Are Water Rates, Which Are Excluded from Preferential**
16 **Rights**

16 Ultimately, it does not matter whether SDCWA’s payments are deemed payments for
17 “Local Water” or “Metropolitan water.” Either way, those payments must be treated in
18 accordance with the Court of Appeal decision that held that the exclusion for the “purchase of
19 water” applies to all water rates. *San Diego*, 117 Cal. App. 4th at 27-28. The Court of Appeal
20 rejected SDCWA’s argument that only payment for “the cost of the water resource” itself may be
21 excluded from the preferential rights calculation, *id.* at 26, which is the same argument SDCWA
22 reasserts in this case.

23 _____
24 ⁴ MWD’s Interim Agricultural Water Program provided interruptible MWD water at
25 discounted rates for agricultural use. MWD Admin. Code §§ 4900 *et seq.*

26 ⁵ As explained in MWD’s Closing Brief, MWD’s invoices for the Exchange Agreement
27 payments have always been for the purchase of MWD water, with a credit for the supply of water
28 that SDCWA traded in-kind. *See, e.g., DTX-1130* at -657. Cushman, SDCWA’s person most
knowledgeable on both preferential rights and breach of contract, agreed with this fact. Cushman
1094:13-17, 1095:9-19. SDCWA always paid these invoices without objection.

1 SDCWA's payments under the Exchange Agreement are volumetric, *i.e.*, per acre-foot,
2 water rates: the System Access Rate (SAR), the System Power Rate (SPR), and the Water
3 Stewardship Rate (WSR). Under *San Diego*, member agency payments of volumetric water rates
4 are excluded from the preferential rights calculation. MWD excludes payment of these rates for
5 all member agencies. *See Skillman 1847:16-1848:16*. If MWD were to include SDCWA's
6 payments of the SAR, SPR, and WSR, it would violate the statute as interpreted by the Court of
7 Appeal. Furthermore, it would disadvantage other member agencies because an increase in any
8 member agency's share of preferential rights decreases other member agencies' shares. *See, e.g.*,
9 *Cushman 1084:21-1085:1*. Granting preferential rights to SDCWA for the payment of the same
10 volumetric water rates charged to all member agencies would be inconsistent with SDCWA's
11 argument that under Section 4.1 it should be treated in the same manner as other agencies. These
12 sections make clear that the payments must be excluded from the preferential rights calculation in
13 compliance with state law.

14 **B. SDCWA Knew When It Entered into the 2003 Exchange Agreement that**
15 **MWD Excluded Payment of Volumetric Water Rates from Preferential Rights**

16 Finally, when the Exchange Agreement was negotiated and executed, MWD had for many
17 years excluded from the preferential rights calculation payments of water rates, a fact SDCWA
18 knew. *Skillman 1847:16-1848:16; see also Cushman 1077:23-1079:1*. Indeed, at that time
19 SDCWA had already lost its preferential rights case before the trial court. *San Diego*, 117 Cal.
20 App. 4th at 22 (noting that the trial court filed judgment on March 25, 2002). If the parties had
21 intended to change MWD's long-standing practice and to provide for a calculation contrary to the
22 trial court's ruling, the parties would have said so. But, even if that had occurred, the next year the
23 Court of Appeal's 2004 decision would have rendered such a provision illegal.

24 ///

25 ///

26 ///

27 ///

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

CONCLUSION

For the foregoing reasons and those set forth in MWD’s Closing Brief, the Court should find that SDCWA did not prove a miscalculation of preferential rights.

DATED: June 19, 2015

QUINN EMANUEL URQUHART &
SULLIVAN, LLP



By _____

Eric J. Emanuel
Attorneys for Respondent and Defendant
Metropolitan Water District of Southern
California

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

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 865 South Figueroa Street, 10th Floor, Los Angeles, California 90017-2543.

On June 19, 2015, I served true copies of the following document(s) described as

**METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S
SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES RE
PREFERENTIAL RIGHTS**

on the interested parties in this action as follows:

SEE ATTACHED LIST

BY FILE & SERVEEXPRESS: by causing a true and correct copy of the documents(s) listed above to be sent via electronic transmission through File & ServeXpress to the person(s) at the address(es) set forth below.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 19, 2015, at Los Angeles, California.



Pamela S. Davis

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

SERVICE LIST

VIA E-SERVICE

John W. Kecker, Esq.
Daniel Purcell, Esq.
Dan Jackson, Esq.
Warren A. Braunig, Esq.
Keker & Van Nest LLP
633 Battery Street
San Francisco, CA 94111-1809
Telephone: (415) 391-5400
Facsimile: (415) 397-7188
Email: jkecker@kvn.com
dpurcell@kvn.com
djackson@kvn.com
wbraunig@kvn.com

Counsel for Petitioner and Plaintiff San Diego County Water Authority

VIA E-SERVICE

Dorine Martirosian, Deputy City Attorney
Glendale City Attorney's Office
613 E. Broadway, Suite 220
Glendale, CA 91206
Telephone: (818) 548-2080
Facsimile: (818) 547-3402
Email: DMartirosian@ci.glendale.ca.us

Counsel for City of Glendale

VIA E-SERVICE

Steven M. Kennedy, Esq.
Brunick, McElhaney Beckett, Dolen & Kennedy, PLC
1839 Commercenter West
San Bernardino, CA 92408-3303
Telephone: (909) 889-8301
Facsimile: (909) 388-1889
Email: skennedy@bmblawoffice.com

Counsel for Three Valleys Municipal Water District

VIA E-SERVICE

Daniel S. Hentschke, Esq.
San Diego County Water Authority
4677 Overland Avenue
San Diego, CA 92123-1233
Telephone: (858) 522-6790
Facsimile: (858) 522-6566
Email: dhentschke@sdcwa.org

Counsel for Petitioner and Plaintiff San Diego County Water Authority

VIA E-SERVICE

John L. Fellows III, City Attorney
Patrick Q. Sullivan, Assistant City Attorney
Office of the City Attorney
3031 Torrance Blvd.
Torrance, CA 90503
Telephone: (310) 618-5817
Facsimile: (310) 618-5813
Email: PSullivan@TorranceCA.Gov
JFellows@TorranceCA.Gov

Counsel for the City of Torrance

VIA E-SERVICE

Stephen R. Onstot, Esq.
Lindsay M. Tabaian, Esq.
Miles P. Hogan, Esq.
Aleshire & Wynder, LLP
18881 Von Karman Avenue, Suite 1700
Irvine, CA 92612
Telephone: (949) 223-1170
Facsimile: (949) 223-1180
Email: sonstot@awattorneys.com
Email: ltabaian@awattorneys.com
Email: mhogan@awattorneys.com

Counsel for Municipal Water District of Orange County

1 **SERVICE LIST (Continued)**

2
3 **VIA E-SERVICE**

4 Michael N. Feuer, City Attorney
5 Richard M. Brown, General Counsel
6 Julie Conboy Riley, Deputy City Attorney
7 Tina P. Shim, Deputy City Attorney
8 Melanie A. Tory, Deputy City Attorney
9 City of Los Angeles
10 111 North Hope Street, Room 340
11 Los Angeles, CA 90012
12 Telephone: (213) 367-4500
13 Facsimile: (213) 367-1430
14 Email: tina.shim@ladwp.com
15 julie.riley@lawp.com
16 melanie.tory@ladwp.com

VIA E-SERVICE

Amrit S. Kulkarni, Esq.
Julia L. Bond, Esq.
Dawn A. McIntosh, Esq.
Edward Grutzmacher, Esq.
Meiners, Nave, Riback, Silver & Wilson
555 12th Street, Suite 1500
Oakland, CA 94607
Telephone: (510) 808-2000
Facsimile: (510) 444-1108
Email: akulkarni@meinersnave.com
jbond@meinersnave.com
dmcintosh@meinersnave.com
egrutzmacher@meinersnave.com

11
12 *Counsel for The City of Los Angeles, Acting by*
13 *and Through The Los Angeles Department of*
14 *Water and Power*

11
12 *Counsel for The City of Los Angeles, Acting by*
13 *and Through The Los Angeles Department of*
14 *Water and Power*

14 **VIA E-SERVICE**

15 Steven P. O'Neill, Esq.
16 Michael Silander, Esq.
17 Christine M. Carson, Esq.
18 Lemieux and O'Neill
19 4165 E. Thousand Oaks Blvd., Suite 350
20 Westlake Village, CA 91362
21 Telephone: (805) 495-4770
22 Facsimile: (805) 495-2787
23 Email: steve@lemieux-oneill.com
24 michael@lemieux-oneill.com
25 christine@lemieux-oneill.com
26 kathi@lemieux-oneill.com

VIA E-SERVICE (Case No. 10-510830 only)

Donald Kelly, Esq.
Utility Consumers' Action Network
3405 Kenyon Street, Suite 401
San Diego, CA 92110
Telephone: (619) 696-6966
Facsimile: (619) 696-7477
Email: dkelly@ucan.org

Counsel for Utility Consumers' Action Network

21
22 *Counsel for Eastern Municipal Water District,*
23 *Foothill Municipal Water District, Las Virgenes*
24 *Municipal Water District, West Basin*
25 *Municipal Water District, and Western*
26 *Municipal Water District*