IMPERIAL IRRIGATION DISTRICT
FRANK A. OSWALT, III (Bar No. 62325)
JOANNA SMITH HOFF (Bar No. 243673)
333 E. Barioni Blvd., Imperial, CA 92251
Tel: (760) 339-9530; Fax: (760) 339-9062
faoswalt@IID.com; jshoff@IID.com

COX, CASTLE & NICHOLSON LLP
STANLEY W. LAMPORT (Bar No. 105933)
CHRISTIAN H. CEBRIAN (Bar No. 245797)
ERIC J. COHN (Bar No. 324818)
2029 Century Park East, 21st Floor
Los Angeles, CA 90067-3284
Tel: (310) 284-2200; Fax: (310) 284-2100
slamport@coxcastle.com; ccebrian@coxcastle.com
ecohn@coxcastle.com

DOWNEY BRAND LLP
DAVID R.E. ALADJEM (Bar No. 152203)
MEREDITH E. NIKKEL (Bar No. 254818)
DAVID E. CAMERON (Bar No. 278061)
621 Capitol Mall, 18th Floor
Sacramento, CA 95814-4731
Tel: (916) 444-1000; Fax: (916) 444-2100
daladjem@downeybrand.com; mnikkel@downeybrand.com
dcameron@downeybrand.com

Attorneys for Petitioner
IMPERIAL IRRIGATION DISTRICT

Exempt from filing fees pursuant to Gov't Code Section 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

IMPERIAL IRRIGATION DISTRICT,

Petitioner,

vs.

THE METROPOLITAN WATER DISTRICT OF SOUTHER CALIFORNIA; and Does 1 through 20, inclusive,

Respondents.

COACHELLA VALLEY WATER DISTRICT; PALO VERDE IRRIGATION DISTRICT; CITY OF NEEDLES; and DOES 21-40, inclusive,

Real Parties in Interest.

CASE NO. 19STCP01376

Assigned for all purposes to The Honorable Judge Daniel S. Murphy, Department 32

PETITIONER IMPERIAL IRRIGATION DISTRICT'S OPENING BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE

(REQUEST FOR JUDICIAL NOTICE FILED CONCURRENTLY HEREWITH)

Trial Date: November 23, 2020
Time: 8:30 am

Petition filed: April 18, 2019

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I.

INTRODUCTION

Petitioner Imperial Irrigation District ("IID") seeks a writ of mandate directing Respondent The Metropolitan Water District of Southern California ("MWD") to vacate its March 12, 2019 approval ("March Approval") of multiple agreements for the implementation of the Lower Basin Drought Contingency Plan ("DCP"). MWD's March Approval included intrastate agreements with Real Parties Palo Verde Irrigation District ("PVID"), Coachella Valley Water District ("CVWD") and City of Needles ("Needles") necessary for California's implementation of the DCP. Under the DCP, California, Nevada and Arizona must curtail water deliveries from the Colorado River ("Rover") when water levels in Lake Mead decline to specified elevations. The intrastate agreements concern the allocation of California's DCP obligation among IID, MWD and the Real Parties, which are the five California agencies that draw water from the River.

The DCP was the result of years of planning and development to address long-term drought conditions on the River including among IID, MWD and the Real Parties. That planning and development process resulted in a series of proposed intrastate agreements, which MWD approved on December 11, 2018 ("December Approval"). Under the December Approval, IID would be responsible for bearing 125 thousand acre feet ("taf")[1] of the required California DCP water contributions to Lake Mead in each of the first two years that the elevation in Lake Mead triggered a California contribution. PVID and CVWD would contribute 15 percent of each California contribution, and MWD would be responsible for the remaining amount.

For political reasons, MWD's March Approval effectively removed IID from the intrastate agreements and implementation of the DCP. The March Approval was a sudden and abrupt departure from the terms of the intrastate agreements in the December Approval, and from the prior years of planning and development on which those terms were founded. The March Approval

[1] An acre foot ("af") equals about 326,000 gallons, or enough water to cover an acre of land, about the size of a football field, one foot deep. (RJN ¶ 1, Exhibit A.) All references to "taf" are to "thousand acre feet."

represents an unprecedented increase and acceleration of MWD's commitment to contribute an enormous amount of water to Lake Mead, thereby reducing its River water deliveries.

Instead of addressing the significant potential environmental impacts that could result from the March Approval, MWD improperly evaded the critical environmental review mandated by the California Environmental Quality Act ("CEQA") by wrongly relying on a Class 1 categorical exemption that only applies to minor alterations of existing facilities involving negligible or no expansion of use**.** The March Approval is not such a project.

Under the March Approval, MWD committed to assume IID's 250 taf share[2] of California 's DCP contributions, which is a substantial increase and change from the December Approval. The 250 taf obligation MWD assumed in the March Approval is a volume that would cover over 390 square miles in a foot of water.[3] It is enough water to serve approximately 750,000 homes or 2.25 million people for a year,[4] It could supply over half of the more than 4 million people residing in City of Los Angeles for an entire year.[5]

The severe environmental consequences of California's decreasing reliance on River water are already well known. California has already been forced to reduce its reliance on the River as a result of Arizona and Nevada's increasing reliance on the River water. To do so, the California agencies have worked together to take various actions, including entering into historic agreements to implement water conservation programs and water transfers. California's decreased reliance on the River has not occurred without environmental ramifications in the state. MWD has drawn on California's natural water resources to make up some of the shortfall. MWD's increasing reliance on the Sacramento/San Joaquin River Delta has resulted in significant habitat degradation, which, in turn, has led to threatened and endangered species. Further, transferring conserved water from agriculture

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[2] An annual obligation of 125 taf for two years equals 250 taf.

[3] There are 640 acres in a square mile.

[4] In MWD's service area today, an acre-foot serves three households due to increased water conservation efforts. Within each household in MWD's service area today, there are on average a little over three people. Thus, an acre-foot of water within MWD's service area is enough to serve 9 people for a year and 250 taf of water would serve approximately 750,000 homes or 2.25 million people for a year. (RJN ¶ 2, Exhibit B, pp. 1-2.)

[5] (RJN ¶ 3, Exhibit C, p. 1.)

in the Imperial Valley to urban use by San Diego County Water Authority has resulted in a shrinking Salton Sea. The consequent uncovering of the receding Salton Sea's shores (or playa) has created fugitive dust emissions, which contribute to one of the highest rates of respiratory distress (especially asthma) in the United States.

To make up for MWD's increased and accelerated DCP water contribution obligation to Lake Mead, the March Approval relies on speculative future conservation measures, which, in themselves, will not satisfy MWD's commitment. To lessen this burden, MWD relied on statistical slight-of-hand to reduce its expected DCP water contribution obligation by 30 percent, which it accomplished by changing the calculation from the average DCP water contribution in the December Approval to the median DCP water contribution in the March Approval. If MWD's speculative sources are not realized, or do not meet MWD's higher average DCP water contribution obligation, MWD would have no choice but to rely on California water resources not identified in the March Approval, which are already highly constrained.

In the simplest terms possible, MWD agreed to contribute an additional 250 taf to Lake Mead under the DCP without any environmental analysis or consideration of where it would obtain that water by wrongly declaring the project exempt from CEQA. In so doing, MWD evaded CEQA's mandate that public agencies must address the potential environmental impacts of decisions with long term consequences at the outset of a project, particularly with respect to water.

The March Approval is not a Class 1 categorically exempt project. It is not a minor alteration of an existing facility, but a commitment that could further deplete California's natural resources. The 250 taf obligation MWD assumed is not a negligible expansion of use.[6] Even if the March Approval could fall within the Class 1 categorical exemption, which is not the case, the unusual circumstances exception renders the exemption inapplicable.

IID has learned from its experience with the Salton Sea that decisions like the March Approval can have long term environmental consequences on natural resources across the state, which

[6] For purposes of comparison, MWD typically imports about 1.2 million acre-feet per year from Northern California. Thus, the *increase* of such imported water associated with the March Approval is on the order of an additional 10 percent of MWD's existing deliveries. (RJN ¶ 4, Exhibit D, p. 51 (B-67).) During an extended drought, this percentage would be much greater.

must be addressed up front. Accordingly, IID respectfully requests this Court to issue a writ directing MWD to rescind the March Approval and direct MWD to comply with CEQA before taking any further action related to the March Approval.

II.

FACTS AND PROCEDURAL HISTORY

A. California's Use Of The Colorado River

Diversions of water from the Colorado River[7] constitute a significant source of Southern California's water supply. (AR 6692.) There are currently five California governmental entities that hold rights to divert water from the River, Petitioner IID, which holds senior water rights, Respondent MWD, and the Real Parties. (AR 7270, 3308-3309, 7026, 7035-7037, 1326.)

For purposes of allocating water, the River is divided into an Upper Basin and a Lower Basin. (AR 2633.) California, Nevada and Arizona comprise the Lower Basin. (*Id*.) In 1928 Congress allocated 7.5 million acre feet ("maf")[8] to the Lower Basin, of which California was apportioned 4.4 maf. (AR 2707.)

For many years California's water needs exceeded the state's allocation. (AR 7069-7071; 9567-9569.) As a result, California legally diverted River water far in excess of its allocation, while, at the same time, Nevada and Arizona diverted far less than their allocations. (*Id*.) That circumstance ended when Nevada and Arizona desired to divert their full allocations. (*Id*.) California is now required to live within the limits of its allocation, while California's enormous water demand remains. (*Id*.) This, in turn, places a great strain on California's other water sources and related natural resources, which are further strained by the increasingly apparent consequences of global climate change. (AR 5685.)

The impacts resulting from California's increased reliance on its in-state water supply are well known. Wildlife habitats have been impacted by the movement of water from Northern California to Southern California. (AR 9575-9578.) In particular, pumping large quantities of water

[7] The River is managed and operated under numerous compacts, federal laws, court decisions and decrees, contracts, and regulatory guidelines collectively known as "The Law of the River." (AR 3936, 3939.) A detailed summary of The Law of the River can be found at AR 2630-2637.

[8] All references to "maf" are to a million acre feet.

from the southern portion of the Sacramento/San Joaquin River Delta has caused large declines in native fish populations, resulting in a number of those fish species being listed as threatened or endangered under either the federal or California Endangered Species Acts. (*Id.*) In Southern California, the need to live within California's allocation resulted in the transfer of about 200 taf/year of conserved water from IID to the San Diego County Water Authority, an MWD member agency. (AR 7624.) This transfer of conserved water from the Imperial Valley to San Diego has caused the Salton Sea to recede and salinity levels to increase, resulting in significant ongoing air quality impacts affecting the surrounding communities, as well as significant impacts on both the fish populations in the Sea and the bird populations that use the Sea as part of the Pacific Flyway. (AR 2451-2457; 6817-7001; 8618-19; 19975.)

B. Drought On The Colorado River

Water supplies from the River have been in long-term decline. (AR9570.) The Colorado River Basin has faced a historic drought beginning in 2000 and during this time the combined storage of Lake Powell and Lake Mead reached the lowest level since Lake Powell began filling in the 1960s. (AR 18439, 1325.)

These conditions set the stage for MWD's decision now before the Court. That decision was preceded by years of planning, which MWD abruptly abandoned between December 2018 and March 2019.

1. The 2007 Lower Basin Interim Guidelines.

Lake Powell and Lake Mead make up the principal water reservoir system for the Lower Basin. (AR 2637.) As the Colorado River entered its eighth year of drought in 2007, the Lower Basin entities adopted the 2007 Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead ("2007 Guidelines") in an effort to coordinate drought response efforts in the basin. (AR 6692, 105.)

The 2007 Guidelines coordinated operations of Lakes Powell and Mead and initiated a lengthy planning process to manage reduced delivery of water from the Colorado River in response to the drought. The 2007 Guidelines included criteria for "balancing" releases between Lakes Powell and Mead and created a mechanism for the Lower Basin states to store conserved water in Lake Mead

through the Intentionally Created Surplus ("ICS") program. (AR 6740-6744, 6729-6734.) Under the ICS program, a state may create ICS if that state offsets the ICS water in Lake Mead through a number of conservation measures that generate conserved water or other measures that include the "development and acquisition of a non-Colorado River System water supply used in lieu of [River] water in the same state." (AR 6729)

The 2007 Guidelines also included a schedule of Lower Basin curtailments of Colorado River diversions if Lake Mead were to drop to an elevation of 1,075 feet or less ("Shortage Condition"). (AR 6727-6728.) The 2007 Guidelines required Arizona and Nevada to curtail River water withdrawals during a Shortage Condition; but the 2007 Guidelines did not require California (and accordingly the California water agencies) to also forgo deliveries during a Shortage Condition. (*Id.*; AR 105, 831, 834.)

These actions set the stage for the DCP, and the California entities' participation in the DCP, which is the subject of this lawsuit.

2. The Lower Basin Drought Contingency Plan.

To prevent the declining water levels in Lake Mead from reaching a Shortage Condition under the 2007 Guidelines, the Lower Basin states in conjunction with the U.S. Bureau of Reclamation ("Reclamation") developed the DCP. (AR 1599.) The DCP's purpose is to cause conservation on the River within the Lower Basin, provide a mechanism for the creation of additional storage in Lake Mead, and allocate the DCP water contribution obligations among the three Lower Basin states. (AR 1604.) Specifically, over a period that runs through 2025, the DCP requires the Lower Basin states to forgo deliveries of River water beyond the levels agreed to under the 2007 Guidelines, when Lake Mead reaches certain predetermined elevations. (AR 1612.)

C. <u>MWD's DCP Participation Approvals</u>

This litigation concerns MWD's participation in a set of intrastate agreements with the Real Parties to implement the DCP in California. In the December Approval, MWD authorized entering into *inter alia* a number of intrastate agreements implementing the DCP in which MWD, IID and the Real Parties would apportion their respective shares of water contributions to Lake Mead

through specifically recognized conservation efforts or reduced River water deliveries under the DCP ("DCP water contribution obligation(s)"). (AR 1422-1425.)

In the March Approval, MWD modified the December Approval and authorized participation in intrastate agreements to implement the DCP without IID. (AR 1599.) Without IID, MWD committed to assume IID's up-to-250-taf DCP water contribution obligation, as well as the share of any Real Party that did not enter into the DCP. (AR 1600, 19265-19268.) This litigation concerns MWD's improper determination that the March Approval was categorically exempt under CEQA, and MWD's failure to analyze the environmental consequences of that commitment.

1. MWD's December Approval.

On December 11, 2018, MWD authorized its general manager to enter into intrastate agreements implementing the DCP, which committed four California entities—IID[9], CVWD, PVID and MWD—to contribute to water storage in Lake Mead at certain specified elevations below a Shortage Conditions by forgoing River water deliveries as follows:

- **Imperial Irrigation District**: IID would be responsible for 125 taf per year for the first two years that the DCP requires California to make water contributions to Lake Mead;
- **Coachella Valley Water District**: CVWD would be responsible for 7 percent of California's DCP water contribution obligation;
- **Palo Verde Irrigation District**: PVID would be responsible for 8 percent of California's DCP water contribution obligation; and
- **Metropolitan Water District of Southern California**: MWD would be responsible for any remaining portion of California's DCP water contribution obligation in excess of these contributions. (AR 1336, 1393, 1422-1424, 1579.)

In the December Approval, MWD based California's DCP water contribution obligation on the estimated average water contribution obligations, with a probability of occurring 10 percent of the time, referred to as the 90th percentile. (AR 1338, 1402-1403.) The December

[9] IID conditionally approved the intrastate DCP agreements at its December 10, 2018 board meeting. (AR 1599.)

Approval estimated that when California would be required to contribute water to Lake Mead, the average California DCP water contribution obligation would be 1 maf (AR 1338, 2512) and MWD's share of California's DCP water contribution obligation would be 1.38 maf at the 90th percentile. (AR 1403.)

Thus, when California is required to contribute 1 maf of water to Lake Mead, MWD would be required to offset 600 taf of that obligation.[10] Naturally, MWD's contribution would be greater when California's DCP water contribution obligation is at the 90th percentile.

In the December Approval, MWD quantified only one currently available water source to meet MWD's DCP water contribution obligations–478.6 taf of ICS stored in Lake Mead at that time. (AR 1395, 2360.) MWD otherwise only identified speculative sources to be made available in the future to meet MWD's DCP water contribution obligations. (*See* AR 1394, 1396-1397, 2360-2361). The December Approval noted that IID's 250 taf obligation would come from already conserved water and/or water to be conserved subject to conservation programs that had already demonstrated environmental compliance. (AR 2324, 2512, 1027.)

Thus, under the December Approval, MWD committed to an average DCP contribution of 600 taf, but only identified one quantifiable already available source that was approximately 120 taf less than that average contribution MWD would be required to make. At the time of the December Approval, MWD was already straining to identify adequate available sources to meet MWD's DCP commitment.

2. MWD's March Approval.

In the March Approval, MWD abruptly and dramatically changed course, and, in the process, abandoned years of planning that went into the DCP water contributions allocated in the December Approval. (*See* AR 831-832 [November 2016 MWD informational agenda item discussing commencement of work with Reclamation in 2015 that has resulted in the DCP].) While IID was seeking federal funding for Salton Sea remediation in connection with the DCP (AR 2486), MWD

[10] IID would contribute up to 250 taf, and CVWD and PVID would contribute 70 taf and 80 taf, respectively, leaving MWD responsible for a balance of 600 taf.

abruptly and effectively cut IID out of the intrastate agreements, by assuming all of IID's 250 taf share of the DCP water contribution obligations. (AR 1600, 19265-19268.)

Specifically, the March Approval authorized MWD's general manager to enter into intrastate agreements to implement the DCP and allocate California's DCP water contributions without one or more of the California entities, meaning IID and the Real Parties.[11] MWD's Colorado River Project Manager described the project as follows:

> The [DCP] requires each Lower [Basin] State to make DCP Contributions in defined volumes, at specified Lake Mead reservoir elevations. How each State will meet its obligations to make DCP Contributions will be determined pursuant to intrastate agreements. MWD negotiated agreements with three other California Contractors, plus a conforming amendment to the California ICS Agreement to define each of the four agencies' shares of California's DCP Contributions. IID had agreed to contribute 125,000 AF per year for the first two years if California is required to make a DCP Contribution, and that draft agreement was part of the package authorized by the MWD board in December. ***If IID does not sign the agreements, MWD would have to contribute the volume of water that IID had committed to in the MWD-IID agreement. That's what it means in the [board] letter when it says authorize MWD to participate in the DCP without one or more of the California Contractors***. MWD would sign the intrastate DCP agreements and commit to pick up a larger portion of California's share of any DCP Contributions.
>
> ***The legal instruments that will be used to work around one or more California Contractor not participating in the DCP is still under discussion both within California and among the other Lower [Basin] States…*** (AR 19265, emphasis added.)

The terms of the intrastate agreements did not otherwise alter PVID and CVWD's contributions; accordingly, the following table illustrates the differences between the December Approval and the March Approval:

[11] More specifically, the March Approval authorized "[MWD] to participate in the [DCP] on behalf of California if the boards of one or more of the other California Contractors [(*e.g.*, IID)] do not authorize their agencies to sign the Lower Basin DCP Agreement; conforming revisions to interstate DCP agreements and related intrastate DCP implementation agreements authorized by the [MWD] Board on December 11, 2018 (attached for reference only Attachment 1-10) may be necessary, in a form reviewed and approved by the [MWD] General Counsel." (AR 1599.)

	December Approval	March Approval
Percentage of CA's Estimated Contribution to be met by MWD based on 1 maf Contribution	60% (AR 1493, 2375, 1336)	85% (AR 2375, 1336, 1600, 2512-13)
Quantity of Water MWD Obligated to Provide over term of DCP	1.38 maf at 90th percentile (AR 19432)	1.63 maf at 90th percentile (AR 19432)
Quantity of Water Identified by MWD available at approval	478,628 acre-feet (AR 1394-1395)	"approximately 600 taf" (AR 1580)
MWD has 250 taf obligation to contribute in first two years	No, IID had 250 taf obligation in first two years (AR 1336, 1393, 1579)	Yes, MWD assumed IID's 250 taf obligation
PVID's Contribution	8 % (AR 1490)	8 % (AR 1663)
CVWD's Contribution	7 % (AR 1498)	7 % (AR 1665)
IID's Contribution	Up to 250,000 af equally split over first two years (AR 1494)	0 AF

MWD assumed IID's 250 taf DCP water contribution obligation, in addition to MWD's prior commitment to backstop any contributions in excess of those provided by CVWD and PVID. (AR 1600, 19265-19268.) As would be mathematically expected, MWD's contribution increased to 1.63 maf at the 90th percentile.[12] (AR 19432.) Furthermore, with CVWD providing 7 percent and PVID providing 8 percent, and IID's 250 taf contribution no longer included, MWD's contribution increased to 85 percent of California's DCP water contribution obligation. Based on the 1 maf estimated average water contribution obligation used in the December Approval, MWD's exposure increased from an average contribution of 600 taf to an average contribution of 850 taf.

The March Approval not only increased MWD's share of California's DCP water contribution obligation, but it accelerated when MWD would need to make that contribution. Under the December Approval, MWD's commitment was in excess of the IID, CVWD and PVID commitments for the first two years that California was required to make a DCP water contribution

[12] 1.38 maf + 250 taf (or .25 maf) = 1.63 maf.

and then starting in the third year MWD was committed to cover the amount of California's DCP water contribution remaining after the 15 percent contributed by CVWD and PVID. (AR1336, 1393, 1422-1424, 1579.)

In authorizing the MWD general manager to enter into an agreement that did not include IID's contribution, the March Approval committed MWD to cover the amount of California's DCP water contribution remaining after the 15 percent by CVWD and PVID beginning in the first year and did not specify the terms of that agreement. (AR 19265.) It did not specify whether MWD would contribute the full 250 taf, whether CVWD and PVID would cover some portion, or whether there would be another arrangement. However, under any scenario, MWD would be required to fulfill its commitment to bear a much larger DCP water contribution obligation and much earlier than had been the case under the December Approval.

3. The March Approval Failed To Adequately Identify Water Sources And Understated MWD's Obligation

Under the March Approval, MWD was now required to come up with an additional 250 taf over the first two years in which contributions under the DCP are required. (AR 1600, 19265-19268.) In the December Approval, MWD had identified only one quantified water source that was approximately 120 taf less than would be required. (*See* AR 1395, 2360.) Adding IID's 250 taf increased the deficit.

To justify its spur-of-the-moment decision, MWD used statistical sleight-of-hand to change the way it calculated its contribution in order to minimize the expected water contribution obligation by 30 percent. The December Approval based MWD's anticipated DCP water contribution obligation on a total average of 1 maf. (AR 1338, 2512.) However, the March Approval conveniently cut the anticipated 1 maf water contribution obligation to only 700 taf, a 300 taf reduction. (AR 1578, 2512.) Instead of using the *average* of anticipated DCP water contribution obligations, which the December Approval used, MWD's March Approval inexplicably used the *median* of expected water contribution obligations, which produced the 30 percent reduction in the total estimated DCP water contribution obligation for California. Thus, while MWD was assuming IID's 250 taf water contribution obligation, MWD's estimated water contribution obligation under the DCP magically

stayed the same. It went from 60 percent of 1 maf (equal to 600 taf) in the December Approval to 85 percent of 700 taf (equal to 595 taf) in the March Approval.

The record shows that MWD's general manager directed the change in the method to calculate the expected DCP water contribution obligation. (AR 19970 ["Would you update Slide 10 (AR 1578) to show the median volume of CA's DCP Contribution? Based on guidance from the GM, I think we are going to talk about the median risk rather than average."]) The March Approval claims that the estimated contribution was reduced due to "better than expected hydrology this year" (AR 2512). But changing the method to calculate the total estimated DCP water contribution obligation from an average contribution to a median contribution has nothing to do with hydrology conditions, and everything to do with depressing the total estimated DCP water contribution obligation.

MWD then attempted to identify water sources to meet its increased and accelerated share of a greatly reduced target. (AR 1580, 2512-2513.) Yet, MWD still failed to identify the source and availability of the water it would need to meet its commitment in the March Approval. (*Id*.)

The March Approval identified only one quantified water source—600 taf of ICS currently stored in Lake Mead, which was approximately 120 taf more than was stated in the December Approval. (Compare AR 1580 to 1395.) The 600 taf would be barely enough for MWD to meet the median of its estimated contribution used in the March Approval, and 250 taf less than would be necessary to meet its contribution based on a 1 maf average in the December Approval.

The rest of the water sources relied on by MWD in the March Approval are amorphous, unquantified and largely speculative. First, the March Approval cites "future Intentionally Created Surplus creation" of approximately 400 taf annually and that MWD may store additional conserved water. (AR 1580.) However, to create new ICS, MWD would need to offset the ICS by means of including developing and acquiring a like amount of water that MWD could use instead. (AR 6729.) The March Approval did not specify the source of the future ICS offset or whether it would be available to allow MWD to meet its commitment.

Second, the March Approval relies on the implementation of the project itself, and future conservation actions by other agencies, to provide up to 300 taf of additional contribution. (AR 1580, 2512-2513.) Specifically, the March Approval relies on a "DCP Contributions and ICS

Accumulation Limits Sharing Agreement," without any explanation or evidence that the other agencies would actually carry out those projects or when the water would be available. (AR 1580, 1656-1662, 2512-2513.)

In sum, in the March Approval, MWD, in the most likely scenario, committed to bear an accelerated 595 taf share of a depressed estimated water contribution obligation (85 percent of 700 taf median figure), which amounts to an accelerated 850 taf share of a 1 maf average. Beyond the 600 taf of ICS currently stored in Lake Mead, some of which might be needed to meet MWD agency demands, the remaining identified contribution sources are from future and conditional actions that were not fully explained, were speculative, and, more importantly, unavailable at the time of the March Approval.[13]

If the future ICS and/or the 300 taf of other agency conservation is not realized and/or MWD's DCP contribution exceeds the average (or median), MWD would need to draw on other water sources to make up for the water contribution obligation. (AR 1610-1613.)

Even assuming that other agencies perform their obligations under the DCP as expected, MWD would need to create additional ICS. The March Approval does not address how the future ICS would or could be created. At the 90th percentile, MWD would need to create an additional 730 taf of ICS to cover its 1.63 maf DCP water contribution obligation. Notably, 730 taf of ICS would be 22 percent more than the approximately 600 taf of ICS MWD had stored in Lake Mead at the time of the March Approval.

Notwithstanding (or perhaps because of) this lack of detail, MWD determined in conclusory fashion that the "result is that water is available to meet DCP obligations." (AR 19432.) MWD put the cart before the horse in its March Approval by committing to meet at least 85 percent of California's DCP water contribution obligation—which could be as high as 1.63 maf—yet failed to identify sufficient existing sources of water to do so.

[13] Nor was the likelihood of availability analyzed at the time of the March Approval.

D. MWD Did Not Evaluate The Potential Environmental Impacts Of Its Action

MWD did not evaluate any environmental impacts from its commitment to dramatically increase and accelerate its share of California's DCP water contribution obligation in the March Approval, particularly if its speculative future water sources are not available or sufficient to make up for the significant reduction of River water required under the DCP.

MWD is already in a continual water shortage position, which it expects will exist during the life of the DCP. (AR 9423 ["The same shortage conditions facing the region in the early 1990s, in 2009-2010, and this year, with imposed fines and penalties for exceeding water use limits, would occur a large percentage of the time. That potential threat of unreliability is too great to ignore; in order to achieve levels of high reliability, significant water supply and conservation investments will be needed."]) According to MWD's own studies, "foreseeable challenges and risk scenarios were identified that point to the potential of 200 taf of additional water conservation and local supplies needed to address these risks." (AR 9342.) **MWD is already water short. MWD's commitment in the March Approval adds to that shortage**.

Despite admitting in the March Approval that it would "assume responsibility to make the up to 250 taf of California's DCP Contribution that IID had agreed to make" (AR 1600, 19265-19268), MWD found the March Approval is subject to the Class 1 categorical exemption in the CEQA Guidelines[14] for minor alterations of existing facilities involving negligible or no expansion of existing or former use because the March Approval was only a minor modification of the December Approval. The March Approval states:

> On December 11, 2019, the Board authorized Metropolitan to enter into Interstate DCP Agreements and related intrastate implementing agreements. These actions were determined by the General Manager to be categorically and statutorily exempt under the provisions of CEQA (Public Resources Code Section 21080(b)(14)) and the State CEQA Guidelines (Sections 15277 and 15301). The current Board action would authorize moving forward with intrastate implementing agreements with those California Contractors who choose to participate, ***which represents only a minor modification to what was authorized in December 2018***. Hence, the previously asserted CEQA exemptions are still applicable. Accordingly, the General Manager has determined that

[14] All references to the CEQA Guidelines are to California Code of Regulations, Title 14, Division 6, Chapter 3.

> no further CEQA documentation is necessary for the Board to approve the proposed action. (AR 1601 [emphasis added].)

The record shows that MWD was more interested in expediency than in conducting any meaningful environmental analysis of the March Approval. (*See* AR 15501-15502 and 2508 [MWD general manager describing this March Approval approach "as a work-around"] and 19266 [MWD staff discussing that the basis for the Class 1 categorical exemption from the December Approval "still *needs* to apply" (emphasis added)]; *see also* AR 1603; 1668 and 1670 [exhibiting the March Approval was all about meeting deadlines versus complying with the law in that the March Approval maintained IID as a party and the IID contribution in the attached agreements, even though the purpose of the March Approval was to authorize implementation of the DCP without IID].)

In response to IID's concerns that the March Approval did not comply with CEQA, MWD's environmental staff and attorneys made the conclusory determination that "nothing has changed since the December action, other than some of the parties' obligations have moved around." (AR 2543.) However, the "obligations that have moved around" is MWD's assumption of 250 taf in water contribution obligations that were previously to be borne by IID without adequately identifying the source of that water or considering what the environmental effects of that effort might be.

E. Members Of The Public, Environmental Organizations, And IID Raised Concerns Over The Environmental Impacts Of The Action

On March 1, 2019, MWD published its agenda for the March 12, 2019 action, which was the first public notice of the action. (AR 1602.) The March agenda broadly stated that the action item was to "[a]uthorize participation in the [DCP] on behalf of California; the general manager has determined that the proposed actions are exempt or otherwise not subject to CEQA."[15] (AR 1566, 1592.) In other words, it was not immediately apparent that MWD was set to authorize implementation of the DCP without IID. The public had only six working days before the hearing to comment.

Before the March Approval, IID, members of the public, and a number of environmental organizations raised concerns to MWD over the environmental impacts of its actions

[15] The relevant action item for the December agenda are pronouncedly similar. (*See* AR 1383, 1413.)

and its compliance with CEQA. (*See* AR 19271, 19982 (IID); AR 17783 (public); AR 17530 (Defenders of Wildlife and Sierra Club); AR 17480 (Environmental Defense Fund and Audubon California).) For example, public comments expressed concerns that the potential adverse environmental impacts of transferring water, as contemplated in the DCP, had not been properly evaluated. (AR 17791.) Members of the public pointed out that because at a minimum 250 taf less water will be available for use within California, there is more than a "fair argument" that the action may have a significant effect on the environment. (AR 17792-17793.) Public comment noted that the Class 1 categorical exemption for existing facilities did not apply because a significantly increased expansion of use was proposed. (AR 17788-17789.) IID commented questioning MWD's continued reliance on CEQA exemptions without fully determining the extent of the modification of the March Approval and accordingly without evaluating the potential environmental impacts of that yet to be determined modification. (AR 19982.)

In other words, IID challenged MWD's determination that the March Approval was only a "minor modification" of the December Approval and that the environmental analysis (or lack thereof) from the December Approval could simply be carried over to the March Approval. (*Id*.) In addition, numerous environmental organizations questioned MWD's large DCP commitment of water without identifying sufficient sources of water to do so and the potential environmental impacts, including impacts related to the Salton Sea, from failing to do so. (AR 17531-17532.)

Despite MWD being well-aware of these and other serious concerns with the March Approval, on March 12, 2019 MWD approved the March Approval relying on the Class 1 categorical exemption to avoid performing any CEQA environmental review of the decision. (AR 31.)

III.

THE MARCH APPROVAL LOCKS IN POTENTIAL FUTURE IMPACTS

CEQA's fundamental purpose is to promote "[t]he maintenance of a quality environment for the people of the state now and in the future …" (Public Resources Code § 21000(a).) "[E]xpediency should play no part in an agency's efforts to comply with CEQA." (*San Franciscans for Reasonable Growth v. City & County of San Francisco* (1984) 151 Cal.App.3d 61, 74.) Yet, this was a case where expediency ruled the day. (See Section II.D, supra.)

In improperly relying on a categorical exemption, MWD applied CEQA in a manner that defeats its purpose of assuring environmental review occurs before an agency, like MWD, has made a commitment which locks in impacts that CEQA review of later decisions based on that commitment would be powerless to address. As the Supreme Court observed, "the later the environmental review process begins, the more bureaucratic and financial momentum there is behind a proposed project, thus providing a strong incentive to ignore environmental concerns that could be dealt with more easily at an early stage of the project." (*Save Tara v. City of West Hollywood* ("*Save Tara*") (2008) 45 Cal.4th 116, 160, quoting *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 395.) "If postapproval environmental review were allowed, EIR's would likely become nothing more than post hoc rationalizations to support action already taken." (*Id.*)

Likewise, in *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* ("*Vineyard*") (2007) 40 Cal.4th 412, the Supreme Court observed that CEQA review which neglects "to explain the likely sources of water and analyze their impacts, but leaves long-term water supply considerations to later stages of the project, does not serve the purpose of sounding an 'environmental alarm bell' [citation] before the project has taken an overwhelming 'bureaucratic and financial momentum.'" (*Vineyard* at 441.) The Court held that even if uncertainty in the identity of water supplies exists, the analysis must include reasonably foreseeable alternatives and disclose the significant foreseeable environmental impacts of each alternative. (*Id.*)

The guiding principle in these cases is that CEQA should not occur "so late that such review loses its power to influence key public decisions about those projects." (*Save Tara* at 131.) In other words, CEQA review should occur before MWD committed to the 250 taf expansion of its DCP contribution in the March Approval, not when MWD considers future projects to fulfill that commitment. The March Approval concerns agreements, whose terms would lock in MWD's commitment. Meaningful CEQA review of the March Approval could identify measures that could be incorporated into those agreements which might avoid impacts that would otherwise be locked in by the March Approval.

Under CEQA, MWD was required to review the environmental consequences of MWD's commitment to cover at least 85 percent of the California DCP water contribution obligation, not sometime in the future after it has already made that commitment. (*See, e.g., California Farm Bureau Federation v. California Wildlife Conservation Bd.* (2006) 143 Cal.App.4th 173, 195 ["common sense" exemption to CEQA inapplicable to a habitat restoration project because, in part, the project "raises legitimate questions regarding the amount and source of the water being used"].) MWD evaded that obligation by wrongly declaring the March Approval categorically exempt from CEQA.

IV.

MWD'S COMMITMENT TO DRAMATICALLY INCREASE AND ACCELERATE ITS DCP CONTRIBUTION IS NOT SUBJECT TO THE CEQA CLASS 1 EXEMPTION

Instead of conducting the fundamentally requisite environmental analysis, MWD instead approved the March Approval relying on the Class 1 categorical exemption. (AR 31.) The March Approval is not the type of project that falls within the Class 1 categorical exemption because: (i) the March Approval is a large expansion of MWD's DCP water contribution obligation, which is not a negligible expansion of use, and, alternatively, (ii) the December Approval is not a minor alteration of an existing facility. Even if the March Approval is the type of project that falls within the Class 1 categorical exemption—which is not the case—the Class 1 exemption still does not apply because the unusual circumstances exception in the CEQA Guidelines applies. The standard of review for whether a project falls within an exemption and whether the unusual circumstances exception applies are different, and will be addressed in the discussion of these issues.

A. Standard of Review

CEQA Guideline § 15301, entitled "Existing Facilities" states:

> Class 1 consists of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of existing or former use. The types of "existing facilities" itemized below are not intended to be all-inclusive of the types of projects which might fall within Class 1. ***The key consideration is whether the project involves negligible or no expansion of use***. (Emphasis added.)

Whether a categorical exemption applies is a question of law, which the court independently determines. (*Save Our Carmel River v. Monterey Peninsula Water Mgmt. Dist.* ("*Save Our Carmel River*") (2006) 141 Cal.App.4th 677, 693.) Categorical exemptions are construed in light of their statutory authorization, which limits such exemptions to classes of projects that have been determined not to have a significant effect on the environment. (*Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* ("*Azusa*") (1997) 52 Cal.App.4th 1165, 1192.) Categorical exemptions are narrowly construed, "to afford the fullest possible environmental protection." (*Save Our Carmel Riv*er at 697.)

This "principle of interpretation" is embodied in the CEQA Guidelines, which state that CEQA should be interpreted to "afford the fullest possible protection to the environment within the reasonable scope of the statutory language. [Citation.]" (CEQA Guidelines, § 15003(f); *Azusa* at 1193.) "[A] term that does not have a clearly established meaning, such as the exemption for existing 'facilities,' should not be so broadly interpreted so to include a class of businesses that will not normally satisfy the statutory requirements for a categorical exemption, even if the premises on which such businesses are conducted might otherwise come within the vague concept of a 'facility.'" (*Azusa* at 1192-1193.)

The question for the Court is whether substantial evidence in the record supports the agency's factual determination that the project falls within the scope of the categorical exemption as a matter of law. (*Save Our Carmel River* at 694.) Substantial evidence includes facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts. (Pub. Res. Code § 21080(e)(1).) Substantial evidence does not include argument, speculation, unsubstantiated opinion or narrative, or evidence that is clearly inaccurate or erroneous. (Pub. Res. Code § 21080(e)(2).) If there is no substantial evidence in the record to support the exemption as a matter of law, reliance on the exemption is an abuse of discretion. (*Save Our Carmel River* at 694.)

B. MWD's Assumption of IID's DCP Water Contribution Is a Significant Expansion of Use

The Class 1 exemption states, "[t]he key consideration is whether the project involves negligible or no expansion of use." (CEQA Guideline § 15301.) To support a Class 1 exemption,

there must be substantial evidence from which it can be concluded that the project "involves negligible or no expansion of use."

Taking on IID's 250 taf DCP water contribution obligation, and the necessity to offset that increased water contribution out of MWD's water resources, rather than IID's water resources, is obviously a change of use, as well as a substantial expansion of use. There is no substantial evidence to the contrary.

Indeed, commitments to reallocate far less water have been held to be a substantial expansion of use. *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 966-67, held that acquiring a water project, which had been used for hydroelectric power, with the purpose of diverting 17 taf per year from that project for consumptive use, was not a negligible expansion of use, and therefore, not subject to the Class 1 exemption. The court stated that a "project that shifts from a nonconsumptive use to a consumptive use is not a negligible expansion of current use." The court held that reallocating a mere 17 taf annually (only 15 percent of the one-year IID obligation MWD assumed—125 taf) from the water project was a "***massive consumptive use*** [that] removes the project from the scope of the existing facilities exemption." (*Id.* at 967 [emphasis added].)

As a matter of law, the March Approval does not fall within the scope of the existing facilities exemption. (*Save Our Carmel River* at 693.) By any formulation, the March Approval is not a negligible expansion of use. MWD drastically increased its DCP water contribution obligation under the December Approval by assuming IID's 250 taf (125 taf for each of two years). (AR 1600, 19265-19268.) Under the March Approval, MWD must commit more of its resources to make up for the DCP water contribution obligation. The March Approval is a massive expansion of MWD's DCP water contribution obligation, which could require MWD to draw from other water resources to meet the water contribution obligation, which could entail new impacts that are not associated with the use of existing facilities. These are not "negligible" changes to the December Approval.[16]

[16] The March Approval is also not a minor alteration of the DCP involving no or negligible expansion of use. The DCP does not regulate intrastate obligations for each state's DCP water contribution obligation. (AR 19265.) Even if it did, MWD's commitment to assume an additional 250 taf to cover the California DCP water contribution obligation is not a "negligible" change in use.

This situation is quite different from cases where courts have applied the Class 1 exemption for contracts that merely continue existing water deliveries by a water provider. For example, in *North Coast Rivers Alliance v. Westlands Water District* ("*North Coast*") (2014) 227 Cal.App.4th 832, a water district approved a two-year contract renewal to receive 1.15 maf from the federal Central Valley Project. *North Coast* upheld the use of the existing facilities exemption because the contract approvals represented "a continuation for two years without any changes" to existing water supply contracts. (*Id.* at 868 [noting "the amounts of [Central Valley Project] water at stake were the quantities specified in the prior contracts . . . the terms of which were expressly continued without change."]) "In determining whether there is a potential for such an adverse change in the environment, the 'baseline' environmental conditions against which a project is to be compared are the physical conditions existing at the time the agency makes its CEQA determination and/or approves the project." (*Id.* at 872.)[17] "This baseline principle means that a proposal to continue existing operations without change would generally have no cognizable impact under CEQA." (*Id.*)

Unlike *North Coast,* here MWD did not continue the terms of a long-standing contract without change. Rather, MWD abruptly and radically increased and accelerated its water obligation, from 1.38 maf at the 90th percentile in its December Approval to 1.63 maf at the 90th percentile in its March Approval. (Compare AR 1403 to AR 1578; *see also* AR 19432.) Baseline conditions were massively changed by MWD's March Approval, and reliance upon the existing facilities exemption is improper.

C. The December Approval Is Not an Existing Facility

MWD applied the Class 1 categorical exemption by claiming that the March Approval was a minor modification of the December Approval. (AR 1601.) The December Approval authorized MWD's general manager to enter into intrastate agreements implementing the DCP, including with IID, which were never fully executed or effective. (AR 1422-1424, 1599.)

An agreement that never became effective is not an existing facility under CEQA Guideline § 15301. The March Approval is not a continuation of the use of existing facilities under

[17] *North Coast* highlights why CEQA review is required now so that MWD does not lock in a baseline, and consequent environmental impacts, for future water decisions.

the December Approval because the December Approval never became effective. (AR 1599.) The intrastate allocation in the December Approval cannot be an existing facility, because it never came into being. Nor is the March Approval a continuation of the 2007 Guidelines or the DCP, because neither addresses the allocation of California's DCP water contribution obligation among California entities. (*See* AR 831, 834, 6727-6728.)

In addition, the critical commitment in the March Approval is the demand for intrastate water from MWD's sources to cover its newly increased and accelerated DCP water contribution obligation. California's water supply comes from its natural resources—rivers, streams, ground water. They are not facilities. They are natural resources that were just beginning to recover from a record breaking drought.

The Class 1 exemption applies to the "minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features." (CEQA Guideline § 15301.) All of the examples cited in the CEQA Guideline involve structures or equipment in existence, rather than planned uses that have not yet been approved. For example, § 15301(b) refers to "[e]xisting facilities of both investor and publicly-owned utilities used to provide electric power, natural gas, sewerage, or other public utility services." Other examples refer to repair or maintenance of existing structures or landscaping. (CEQA Guideline § 15301(d), (h).)

Azusa held that "a 'facility' is normally defined as 'something (as a hospital, machinery, plumbing) that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end' (Webster's New Internat. Dict. (3d ed. 1981) pp. 812-813); or '[s]omething that is built or installed to perform some particular function ....' (Black's Law Dict. (6th ed. 1990) p. 591.)" (*Azusa*, *supra*, at 1193.) A natural resource does not meet the criteria for a facility. The Class 1 exemption applies to activity within the footprint of existing development such that the exempt activity would not change the effect the existing facility already has on the environment. (*See* Guideline §15301(a)-(p); *see also North Coast*, *supra* at 872-873 ["a proposal to continue existing operations without change would generally have no cognizable impact under CEQA"].) The March Approval is simply not a minor alteration of an "existing facility."

V.

THE UNUSUAL CIRCUMSTANCES EXCEPTION REMOVES THE MARCH APPROVAL FROM THE CATEGORICAL EXEMPTION

Even if the March Approval could fall within the Class 1 categorical exemption, which is clearly not the case, the March Approval is subject to the unusual circumstances exception. CEQA Guideline § 15300.2(c) states that a "categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." The exception applies here.

A. Standard of Review

The "unusual circumstances" exception involves two questions: (i) are there unusual circumstances that do not apply to the typical project to which the exemption applies, and (ii) is there a reasonable possibility of a significant environmental effect due to the unusual circumstances. (*Berkeley Hillside Preservation v. City of Berkeley* ("*Berkeley Hillside*") (2015) 60 Cal.4th 1086, 1115.)

The March Approval did not address the unusual circumstances exception. (*See* AR 31, 1601, 2543-44). Instead, MWD impliedly found the exception did not apply, since it adopted the Class 1 categorical exemption. (*See Save Our Carmel River*, *supra* at 694 [holding a determination that an activity is categorically exempt constitutes an implied finding that none of the exceptions to the exemptions are applicable].) As a result, this Court cannot affirm the agency's implied determination "by simply concluding that the record contains substantial evidence that the project involves no unusual circumstances." (*Respect Life South San Francisco v. City of South San Francisco* ("*Respect Life*") (2017) 15 Cal.App.5th 449, 458.) Instead, this Court must apply the "fair argument standard" to both questions.[18] This Court may uphold MWD's March Approval only if the record contains "no substantial evidence to support either (1) a finding that any unusual circumstances exist or (2) a fair

[18] If MWD had made an express finding to the first question of whether unusual circumstances exist, this Court would have applied the substantial evidence standard of review to that question. (*Berkeley Hillside* at 1114; *Respect Life* at 457.)

argument of a reasonable possibility that any purported unusual circumstances identified by the petitioner will have a significant effect on the environment." (*Id*.)

Under the fair argument standard, a project is not categorically exempt if there is a fair argument, based on substantial evidence in the record, that there is a reasonable possibility the project will have significant environmental impacts due to unusual circumstances. (*Berkeley Hillside* at 1115.) Under the fair argument standard, an agency has abused its discretion if there is any substantial evidence in the record supporting a reasonable possibility that the project involves unusual circumstances and a significant environmental impact due to those circumstances even if there is also substantial evidence in the record to the contrary. (*Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002.) The fair argument standard prevents an agency from weighing competing evidence to determine who has a better argument. (*Id*.) The fair argument standard is considered a "low threshold" test and it "is a question of law, not fact, whether a fair argument exists, and the courts owe no deference to the lead agency's determination. Review is de novo, with a preference for resolving doubts in favor of environmental review." (*Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928.)

B. <u>A Fair Argument Supports the Existence of Unusual Circumstances</u>

The CEQA Guidelines do not define the term "unusual circumstances," but the term is well understood in the courts. Unusual circumstances exist where the circumstances of a particular project differ from the general circumstances of the projects covered by a particular categorical exemption. (*Berkeley Hillside* at 1105; *see also Azusa*, *supra* at 1207.) The exception applies, without evidence of an environmental effect, when the project has some feature that distinguishes it from others in the exempt class, such as its size or location. (*Berkeley Hillside* at 1105.) Even when the project relates to a prior approval that was determined to be exempt, further approvals of the project may not rely on the prior exemption when unusual circumstances result from changed circumstances, such as when significant new information becomes available. (*Meridian Ocean Sys. v. State Lands Com* (1990) 222 Cal.App.3d 153, 164-165 [court, rejecting a "business as usual" argument, determined the existence of unusual circumstances due to newly available scientific evidence, which was not available when a previous exemption was granted].)

Categorical exemptions relate to activities that generally do not result in significant environmental impacts. (*Berkeley Hillside* at 1101.) Projects subject to the Class 1 exemption typically involve activity occurring within the footprint of existing development such that the exempt activity would not be expected to change the effect the existing facility already has on the environment. (*See* Guideline § 15301(a)-(p); *see also North Coast, supra* at 872-873 ["a proposal to continue existing operations without change would generally have no cognizable impact under CEQA"].) CEQA Guideline § 15301 lists as examples activities such as interior partitions, bicycle lanes, restoration of damaged structures, a 2,500 square foot addition to an existing structure, and maintenance of water supply facilities. (CEQA Guideline § 15301(a), (c), (d), (h).)

The March Approval does not share the characteristics of a typical Class 1 project. The allocation of DCP water contribution obligations does not involve a localized facility, but a geographically dispersed water distribution system and water resources that exist over a broad geographic area, which is unlike any project that would typically be subject to a Class 1 categorical exemption. Increasing MWD's share of the DCP water contribution obligation by 250 taf will require MWD to offset the water contribution obligation through other MWD resources, including other water sources. Adjusting water supplies and reallocating intrastate water supplies to address reduced River water deliveries has historically resulted in significant environmental impacts that burden California to this day. (AR 19975.) The fact that the March Approval contemplates relying on creation of future ICS amplifies the burden on MWD's resources, including intrastate water sources, in order to provide the offset required to create ICS.

At the same time, MWD deflated the estimated annual water contribution obligation, by switching from an average water contribution obligation to a median water contribution obligation. (Compare AR 1338 to AR 1578.) By its own admission, MWD is already facing a water shortage in its ongoing operations. (AR 9342, 9345, 9353, 9444.) If MWD does not have enough water from its resources to offset its DCP water contribution obligation, MWD will have to draw on other resources that are not identified in the March Approval.

The March Approval is simply not a project that shares the characteristics of a Class 1 exempt project. The March Approval commits MWD to forgo a significant amount of water and

replace it by drawing on other resources that are already constrained. It is nothing like rehabilitating a damaged structure that will remain in place, or adding a relatively small amount of square footage to an existing building's footprint, which CEQA Guideline § 15301(d) & (e) list as examples of a Class 1 exemption. The March Approval commits MWD to a large-scale reallocation of water over a vast geographically dispersed water distribution system, which is unlike any project that would typically be subject to a Class 1 categorical exemption.

The differences here are much greater than courts have found are unusual circumstances in the context of water system operations. In *Voices for Rural Living v. El Dorado Irrigation Dist.* ("*Voices*") (2012) 209 Cal.App.4th 1096, the court applied the unusual circumstances exception to an irrigation district's commitment to provide water to a tribal casino and hotel project. (*Voices* at 1108-1114.) The project involved relocating an existing three-inch water meter and installing a short section of pipeline linking the meter to an existing water main. (*Id*. at 1103.) The district determined the project was exempt under the Class 3 categorical exemption for new construction or conversion of small structures. (*Id.* at 1104.)

The *Voices* court concluded the unusual circumstances exception applied because the project presented circumstances that are unusual for this categorical exemption. The court found that the project's scope, providing 216 additional equivalent dwelling units ("EDUs") of water to a casino and hotel, was far larger than one to four dwelling units in urbanized areas to which the Class 3 categorical exemption specifically applies. (*See* Guideline § 15303(a).) The court held, "***[t]he sheer amount of water to be conveyed under the MOU obviously is a fact that distinguishes the project from the types of projects contemplated by the class 3 categorical exemption***." (*Id.* at 1109 [emphasis added].)

If a commitment to supply water for 216 EDUs is sufficient to constitute an unusual circumstance, so too is MWD's commitment to offset enough water to serve approximately 750,000 homes for a year. The March Approval's scope and scale is an unusual circumstance that distinguishes it from the types of projects covered by the Class 1 categorical exemption.

C. A Fair Argument Supports a Finding that the Project Could Result In Significant Environmental Impacts

There is more than a fair argument that there is a reasonable possibility of a significant environmental effect due to unusual circumstances of this project. Increasing MWD's share of California's DCP water contribution obligation by 250 taf will require MWD to offset the water contribution obligation through other resources. To offset the water contribution obligation, the March Approval relies on 600 taf of currently stored ICS (AR 1580), which is barely enough to meet 85 percent of the median of the estimated contribution, 250 taf less than would be necessary to meet the contribution based on a 1 maf average, and over 1 maf less than would be necessary to meet its contribution at the 90th percentile. The rest of the offset is based on "future [ICS] creation" (AR 1580) and future potential conservation by other DCP agencies (*Id*.; AR 1656-1662; AR 2512-2513), which may not be available.

The creation of ICS requires MWD to draw on its resources, such as in-state water available to offset it, which the March Approval does not identify. (AR 6729-6734, 1580, 2512-2513.) If the future water sources identified in the March Approval do not materialize, MWD still would be committed to bearing 85 percent of the DCP water contribution obligation for California and would have to turn to other water sources to make up the water contribution obligation. MWD already needs 200 taf to address its water shortage (AR 9342; *see also* AR 1515 [projecting a -700 taf supply-demand imbalance for calendar year 2019]), and would be adding another 250 taf by assuming IID's water contribution obligation.

In that scenario, MWD would be drawing on other resources that are already in environmental distress. MWD has several ways to create ICS, each of which could lead to significant environmental impacts. MWD's water supplies from the California State Water Project, which brings water that is collected at Lake Oroville in Northern California through the Sacramento/San Joaquin River Delta to Southern California, are already experiencing habitat impacts. (AR 9578.)

MWD also relies on groundwater recovery projects and local surface supplies that come from reservoir releases and stream diversions. (AR 9629-9632.) Any further extractions from

such systems would cause impacts to aquifer supplies for other municipalities, impacts on groundwater dependent ecosystems, and depletions of surface water supplies in the region. (*Id*.)

The March Approval does not specify the water sources that could be tapped to offset future ICS. Any source of water used by MWD to backfill IID's DCP obligation could result in significant environmental impacts due to the unusual circumstances of the March Approval.

D. MWD Cannot Rely on Mitigation Measures to Support a Categorical Exemption

MWD may argue in opposition that any significant impacts resulting to its commitment to offset 85 percent of the DCP water contribution obligation for California would be mitigated by measures developed through prior CEQA review. (*See, e.g.,* AR 2351, 2374-2376 ["impacts have been mitigated and accounted for, as required by their existing environmental compliance documents . . . the water that we would borrow is water that's generated under existing programs."])

No finding was made by MWD for either the December or March Approvals that it relied on a prior CEQA document. (*See* AR 1425, 1601.) However, "proposed mitigation measures cannot be used to support a categorical exemption; they must be considered under the standards that apply to a mitigated negative declaration." (*Salmon Protection & Watershed Network v. County of Marin* ("*Salmon Protection*") (2004) 125 Cal.App.4th 1098, 1107; quoting *Azusa*, *supra*, at 1199.) The reason for this rule is because the categorical exemption determination is made during the preliminary project review where CEQA does not provide mechanisms to evaluate the adequacy of the mitigation in light of the potential impacts. (*Salmon Protection* at 1107-1108; *Azusa* at 1200.) If mitigation measures are needed to avoid potentially significant effects, then, at a minimum, a mitigated negative declaration must be prepared. (*Id*.)

Under the unusual circumstances exception, the only question is whether there are potential impacts due to the unusual circumstances, not whether those potential impacts would or could be mitigated. (*Salmon Protection* at 1107; *Azusa* at 1200.) Under the unusual circumstance exception, "an activity that may have a significant effect on the environment cannot be categorically exempt." (*Salmon Protection* at 1107, quoting *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 1121.) If a project may have a significant effect on the environment, CEQA review must occur, and only then are mitigation measures relevant. (*Azusa* at 1199–1200.)

VI.

THE MARCH APPROVAL IS NOT SUBJECT TO A STATUTORY EXEMPTION

MWD appears to assert that the March Approval is at least partially exempt from CEQA under a statutory exemption related to portions of a project located outside of California. (AR 1601 [citing Pub. Res. Code § 21080(b)(14)].) Once again, the exemption does not apply.

A. Statutory Exemption Standard of Review

The applicability of a statutory exemption, such as § 21080(b)(14), is a question of law that is reviewed *de novo*. (*East Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified School Dist.* ("*East Peninsula*") (1989) 210 Cal.App.3d 155, 165.) A statutory exemption should be strictly construed (*Id.* at 171) and interpreted "in such manner as to afford the fullest possible protection of the environment within the reasonable scope of the statutory language." (*Id.*)

An agency's factual determination that the activity falls within the scope of the statutory exemption is subject to review under the substantial evidence test. (*Sierra Club v. County of Sonoma* (2017) 11 Cal.App.5th 11, 17.) When a statutory exemption includes exceptions requiring consideration of environmental impacts, the failure to consider those environmental impacts is a prejudicial abuse of discretion. (*East Peninsula* at 171, 174.)

B. The March Approval is Not Statutorily Exempt From CEQA

Public Resources Code Section 21080(b)(14) states:

> (b) This division does not apply to any of the following activities …
> (14) Any project or portion thereof located in another state which will be subject to environmental impact review pursuant to the National Environmental Policy Act ["NEPA"] of 1969 (42 U.S.C. Sec. 4321 et seq.) or similar state laws of that state. Any emissions or discharges that would have a significant effect on the environment in this state are subject to this division.

The December Approval states it relies on the out-of-state exemption "to the extent the proposed actions involve or may affect areas outside of California, such as at Lake Mead or on the portions of the Colorado River in Nevada and Arizona…" (AR 1425.) The December Approval asserts that such "proposed actions are within the scope of the actions that were previously analyzed in [the 2007 Guidelines, which were analyzed in an Environmental Impact Statement (EIS) pursuant to

the National Environmental Policy Act (NEPA) of 1969] document, and will be subject to further environmental review under the NEPA as necessary." (AR 1425.)

MWD continued this *limited* reliance on the "out-of-state" statutory exemption in its March Approval. (AR1601.) However, the exemption clearly does not apply to the diversion and use of California water *within California* to make up California's DCP water contribution obligation. As noted above, it is the potential environmental impacts within California that IID and representatives of environmental organizations brought to MWD's attention before the March Approval and that MWD refused to consider. That studied ignorance as to potential effects within California violated CEQA.

VII.

CONCLUSION

For the foregoing reasons, IID respectfully requests this Court find MWD failed to comply with CEQA when making its March Approval and issue a writ directing MWD to rescind the March Approval and to comply with CEQA before taking any further action related to the March Approval.

DATED: July 8, 2020

COX, CASTLE & NICHOLSON LLP

By: _____

Stanley W. Lamport
Attorneys for Petitioner IMPERIAL IRRIGATION DISTRICT

PROOF OF SERVICE AND CERTIFICATION

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 2029 Century Park East, Suite 2100, Los Angeles, CA 90067, and my email address is rlee@coxcastle.com.

On July 8, 2020, I served the foregoing document(s) described as: **PETITIONER IMPERIAL IRRIGATION DISTRICT'S OPENING BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE** on ALL INTERESTED PARTIES in this action by placing ☐ the original ☐ a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

On the above date:

☐ (BY ☐ U.S. MAIL/BY ☐ EXPRESS MAIL) The sealed envelope with postage thereon fully prepaid was placed for collection and mailing following ordinary business practices. I am aware that on motion of the party served, service is presumed invalid if the postage cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing set forth in this declaration. I am readily familiar with Cox, Castle & Nicholson LLP's practice for collection and processing of documents for mailing with the United States Postal Service and that the documents are deposited with the United States Postal Service the same day as the day of collection in the ordinary course of business.

☐ (BY FEDERAL EXPRESS OR OTHER OVERNIGHT SERVICE) I deposited the sealed envelope in a box or other facility regularly maintained by the express service carrier or delivered the sealed envelope to an authorized carrier or driver authorized by the express carrier to receive documents.

☒ (BY E-MAIL OR ELECTRONIC TRANSMISSION) – On July 8, 2020, at Los Angeles, California, I served the above-referenced document by electronic mail to the e-mail address of the addressee(s) pursuant to Rule 2.251 of the California Rules of Court. The transmission was complete and without error and I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

☐ (BY PERSONAL DELIVERY) By causing a true copy of the within document(s) to be personally hand-delivered to the office(s) of the addressee(s) set forth above, on the date set forth above.

I hereby certify that the above document was printed on recycled paper.

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

Executed on July 8, 2020, at Los Angeles, California.

Ramona Lee

SERVICE LIST
Imperial Irrigation District v. The Metropolitan Water District of Southern California
Case No.: 19STCP01376

Frank A. Oswalt, III, Esq. Joanna Smith Hoff, Esq. IMPERIAL IRRIGATION DISTRICT 333 E. Barioni Boulevard Imperial, CA 92251 Telephone: (760) 339-9530; Fax: (760) 339-9062 Email: faoswalt@IID.com; jshoff@IID.com	Attorneys for Petitioner *IMPERIAL IRRIGATION DISTRICT*
David R.E. Aladjem, Esq. Meredith E. Nikkel, Esq. David E. Cameron, Esq. DOWNEY BRAND LLP 621 Capital Mall, 19th Floor Sacramento, CA 95814-4731 Telephone: (916) 444-1000 Fax: (916) 444-2100 Email:daladjem@downeybrand.com; mnikkel@downeybrand.com; dcameron@downeybrand.com	
Marcia Scully, Esq. John D. Schlotterbeck, Esq. Michael W. Hughes, Esq. Patrick B. Rohen, Esq. THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA P.O. Box 54153 Los Angeles, CA 90054-0153 700 N. Alameda Street Los Angeles, CA 90012 Telephone: (213) 217-6000; Fax (213) 217-6890 Email: prohen@mwdh2o.com; mscully@mwdh2o.com; jschlotterbeck@mwdh2o.com; mhughes@mwdh2o.com	Attorneys for Respondents *THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA*
Steven B. Abbott, Esq. REDWINE AND SHERRILL LLP 3890 11th Street, Suite 207 Riverside, CA 92501-3577 Telephone: (951) 684-2520; Fax: (951) 684-5491 Email: sabbott@redwineandsherrill.com; fluna@redwineandsherrill.com (Fina Luna)	Attorneys for Real Party In Interest *COACHELLA VALLEY WATER DISTRICT*
David R. Saunders, Esq. CLAYSON BAINER & SAUNDERS Clayson Law Building 601 South Main Street P.O. Box 1447 Corona, CA 92882-3418 Telephone: (951) 737-1910 Email dsaunders@Claysonlaw.com	Attorneys for Real Party in Interest *PALO VERDE IRRIGATION DISTRICT*

Shaun M. Murphy, Esq.
Katelyn K. Empey, Esq.
SLOVAK, BARON, EMPEY, MURPHY & PINKNEY LLP
1800 East Tahquitz Canyon Way
Palm Springs, CA 92262
Telephone: (760) 322-2275 Fax: (760) 322-2107
Email: murphy@sbemp.com; kempey@sbemp.com

Attorneys for Real Party In Interest
CITY OF NEEDLES