



THE METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA

Office of the General Counsel

Via Email

April 23, 2021

Mark J. Hattam, General Counsel
San Diego County Water Authority
4677 Overland Avenue
San Diego, CA 92123

Re: April 11, 2021 "Cease and Desist" Letter

Dear Mr. Hattam:

This letter responds to your April 11, 2021 "cease and desist" letter (attached) stating your objection to Metropolitan's description in the draft 2020 Urban Water Management Plan (UWMP) of water provided to Metropolitan under the parties' 2003 Amended and Restated Exchange Agreement as "Colorado River water made available to Metropolitan." Your objection is inconsistent with the plain language of the Exchange Agreement and fails to acknowledge that Metropolitan has statutory reporting requirements under the Urban Water Management Planning Act that govern its reporting in the UWMP.

The Exchange Agreement provides that SDCWA makes available Colorado River water to Metropolitan in exchange for Metropolitan deliveries

The parties' Exchange Agreement expressly states that SDCWA "makes available" Colorado River water to Metropolitan at Lake Havasu, where the water becomes Metropolitan's water. In exchange, Metropolitan delivers to SDCWA in San Diego County water from any source.

Specifically, in the Exchange Agreement, the parties agreed:

- **"SDCWA will Make Available the Conserved Water and/or the Canal Lining Water to Metropolitan at the SDCWA Point of Transfer. . . ."** (Exch. Agmt., § 3.1(a) (emphasis added); see also §§ 3.1 – 3.7, which are replete with use of Make Available and Made Available with respect to the water SDCWA provides to Metropolitan.)
- The Conserved Water means Colorado River water that the Imperial Irrigation District (IID) transfers to SDCWA via the IID-SDCWA Transfer Agreement. (Exch. Agmt., §§ 1.1(h), 3.1(a).)

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- The Canal Lining Water means Colorado River water conserved by the lining of the All-American Canal and the Coachella Canal that Metropolitan allocated to SDCWA in the Allocation Agreement. (Exch. Agmt., §§ 1.1(f), 3.1(a).)
- The SDCWA Point of Transfer of this Colorado River water from SDCWA to Metropolitan is Lake Havasu. (Exch. Agmt., § 3.5(a).)
- “‘Made Available’, ‘Make Available’, or ‘Making Available’” refers to the moment when (1) the Colorado River water has been transferred to SDCWA under the Transfer Agreement and/or allocated to SDCWA pursuant to the Allocation Agreement, (2) the Bureau of Reclamation has authorized Metropolitan to divert the water at Lake Havasu, and (3) all other legal requirements for diversions from the Colorado River by Metropolitan have been met. (Exch. Agmt., § 1.1(r).)
- In exchange, Metropolitan delivers water to SDCWA (defined in the agreement as Exchange Water) “in a like quantity as the quantity of water that SDCWA has Made Available to Metropolitan,” which “may be from whatever source or sources and shall be delivered using such facilities as may be determined by Metropolitan.” (Exch. Agmt., §§ 1.1(m) (emphasis added), 3.2.)
- Metropolitan’s deliveries to SDCWA are made in approximately equal monthly installments, while SDCWA does not make the Colorado River water available to Metropolitan in similar installments. (Exch. Agmt., §§ 3.1, 3.2(c).)
- Metropolitan’s deliveries to SDCWA (called the Metropolitan Point(s) of Delivery) are made in Northern San Diego County. (Exch. Agmt., § 3.5(b).)

Under the Exchange Agreement, each year pursuant to these terms, SDCWA has made available conserved IID and canal lining Colorado River water to Metropolitan, and Metropolitan has delivered a like quantity of water to SDCWA from any of its sources (generally this is a blend of State Water Project water and Colorado River water).

Metropolitan’s description of the water it receives from SDCWA under the Exchange Agreement as “Colorado River water made available to Metropolitan” is correct.

The Exchange Agreement does not change statutory reporting requirements

SDCWA’s objection to Metropolitan’s description is based on Section 4.1 of the Exchange Agreement, which provides that the water Metropolitan delivers to SDCWA under the Exchange Agreement shall be characterized for purposes of Metropolitan’s ordinances, plans, programs, rules, and regulations “in the same manner as the Local Water of other Metropolitan member agencies,” with exceptions. However, Section 4.1 concerns the water Metropolitan delivers to SDCWA (which the text establishes is not, in fact, local water); Section 4.1 does not speak to the

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water that SDCWA makes available to Metropolitan. Also, Section 4.1 does not concern state-mandated reporting requirements. While Metropolitan has authority and discretion with regard to the ordinances, plans, programs, rules, and regulations it creates, that is not the case with regard to statutory reporting requirements enacted and enforced by the State of California.

As explained in the draft UWMP, that plan is prepared to comply with the Urban Water Management Planning Act, codified at California Water Code, Section 10610, *et seq.* The Act requires Metropolitan to develop a water management plan “to achieve the efficient use of available supplies and strengthen local drought planning.” (Water Code § 10610.4 (c) (emphasis added).) Metropolitan must “describe and evaluate sources of supply” pursuant to Water Code Sections 10615 and 10632(a)(2)(B)(v), “[i]dentify and quantify ... existing and planned sources of water available to” Metropolitan pursuant to Section 10631(b) (emphasis added), and “[d]escribe the opportunities for exchanges or transfers of water on a short-term or long-term basis” pursuant to Section 10631(c). Therefore, Metropolitan must report all water supplies made available to Metropolitan to meet demands, including the water made available to Metropolitan under the Exchange Agreement.

In any event, Metropolitan does, indeed, describe the details of the Exchange Agreement in the UWMP. Metropolitan explains the transaction, including that SDCWA obtained the Colorado River water, SDCWA makes the water available to Metropolitan at Lake Havasu, and Metropolitan delivers to SDCWA a like quantity of water in exchange for the water made available to it. (Draft 2020 UWMP, §§ 1.4, 3.1, Appendix 3.1 subsection J, and Appendix 4 (WSCP) subsection A.4-3.)

Metropolitan looks forward to collaboration on meeting the UWMP Act reporting requirements

Accordingly, the matter you raise is not a contract issue related to the Exchange Agreement. Instead, it is an issue of meeting statutory reporting requirements. Footnote 1 at page 1-22 of the draft UWMP explains that past Metropolitan UWMP reporting actually inconsistently excluded the water made available to it by SDCWA from the listing of local supplies in certain areas, but also referred to the water as local supplies at SDCWA’s request. However, as a result of an evaluation of the statutory reporting requirements, along with a recognition that inconsistency within the UWMP is not appropriate, Metropolitan now reports the water in a manner that follows statutory requirements and is consistent within the plan.

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Nothing in the UWMP reporting changes the nature or terms of the Exchange Agreement. Furthermore, as stated, the transaction is described in the plan. Therefore, we do not understand the purpose of the "cease and desist" request, nor do we understand what practical, legal, or other material effect SDCWA believes this UWMP reporting item has on SDCWA. We, too, look forward to a more productive working relationship.

Very truly yours,

A handwritten signature in black ink, appearing to read "mscully", written in a cursive style.

Marcia Scully
General Counsel

Attachment

cc: Metropolitan Board of Directors
SDCWA Board of Directors
Jeff Kightlinger, MWD General Manager
Sandy Kerl, SDCWA General Manager

April 11, 2021

MEMBER AGENCIES

Carlsbad
Municipal Water District

City of Del Mar

City of Escondido

City of National City

City of Oceanside

City of Poway

City of San Diego

Fallbrook
Public Utility District

Helix Water District

Lakeside Water District

Olivenhain
Municipal Water District

Otay Water District

Padre Dam
Municipal Water District

Camp Pendleton
Marine Corps Base

Rainbow
Municipal Water District

Ramona
Municipal Water District

Rincon del Diablo
Municipal Water District

San Dieguito Water District

Santa Fe Irrigation District

South Bay Irrigation District

Vallacitos Water District

Valley Center
Municipal Water District

Vista Irrigation District

Yuima
Municipal Water District

OTHER
REPRESENTATIVE

County of San Diego

Marcia Scully, General Counsel
Metropolitan Water District of Southern California
700 N. Alameda Street
Los Angeles, CA 90012

RE: Exchange Agreement Section § 4.1/Demand to Cease and Desist

Dear Ms. Scully:

This letter is to make formal demand that Metropolitan Water District of Southern California (MWD) immediately cease and desist from further publication in its Urban Water Management Plan (UWMP) or in any other context, publication, proceeding or social media, that the Water Authority's QSA water is an MWD water supply and not a local supply of the San Diego County Water Authority.

The Draft 2020 Urban Water Management Plan (UWMP) changes how MWD characterizes the Water Authority's QSA water (exchange water) so that it is no longer reported as an independent local supply of the Water Authority, and is instead reported as "Colorado River water made available to Metropolitan." MWD admits in footnote 1 at page 1-22 of its draft UWMP that this is a departure from prior reporting.

These changes do not comply with Section 4.1 of the Exchange Agreement, which expressly requires that the exchange water be characterized in all of MWD's plans as a local supply. Accordingly, we ask that MWD modify its draft 2020 UWMP to continue its prior and correct practice of describing the exchange water as a local supply of the San Diego County Water Authority (including but not limited to portions of the UWMP Executive Summary; Sections 1.4, 2.2, 2.3 and 3.1; Appendix 2; and Sections A.3.1 and A.4.3.)

Aside from the confusion the new reporting practice may cause in assessing MWD's water supply reliability, MWD is also contractually bound to characterize the Water Authority's exchange water as a local water supply. Section 4.1 of our agencies' Exchange Agreement is titled "Exchange Water as an Independent Local Supply," and could not be clearer that MWD's UWMP is required to comply with the contract:

"The Exchange Water shall be characterized for the purposes of all of Metropolitan's ordinances, plans, programs, rules and regulations . . . in the same manner as the Local Supply of other Metropolitan member agencies, except as provided in Paragraphs 4.2 and 5.2 [which are pricing sections unrelated to the UWMP]." (Emphasis added.)

The Water Authority, not MWD, has paid to conserve its QSA water supply through the lining of the All-American and Coachella Canals, and via our water conservation agreement with the Imperial Irrigation District. As the trial court and Court of Appeal have already determined, the

Water Authority is not purchasing this water from MWD, and MWD has no legal right, ownership or entitlement to this water independent of the provisions contained in the Exchange Agreement.

MWD's UWMP is clearly included in the contractual requirement relating to MWD's characterization of the Water Authority's QSA supplies as a local supply in "all" of its plans. Accordingly, MWD will be in breach of the Exchange Agreement if it fails to properly characterize the Exchange Agreement water as a local supply of the Water Authority.

It should also be noted that MWD's mischaracterization of the exchange water in the draft UWMP violates not only the parties' contract, but also the clear holding of the Court of Appeal, which states on page 1155 of its decision that the trial court was correct in finding that the Exchange Agreement was a conveyance of the Water Authority's water, not a contract for the purchase of MWD water as advocated by MWD (emphasis added):

The trial court found "the Exchange Agreement was not an agreement pursuant to which [the Water Authority] obtained water from [Metropolitan], but instead an agreement pursuant to which [Metropolitan] in effect conveyed water on behalf of [the Water Authority]." Thus, the Water Authority's "payments under the exchange agreement must be included in the preferential rights calculation." *We agree with this conclusion.*

To the extent that MWD staff is engaged in the distribution or publication of inaccurate information regarding the Exchange Agreement water via social media or otherwise in San Diego County or elsewhere, this is also a demand that MWD immediately cease and desist from such activity.

The Water Authority's board officers and General Manager have asked me to convey to the MWD Board of Directors and member agencies that we deeply regret the continued need for communications such as this, and that we look forward to a more productive working relationship in the near future.

Sincerely,

/s/

Mark Hattam
General Counsel

cc: Water Authority MWD Delegates Hogan, Butkiewicz, Smith and Goldberg
Water Authority Board Officers and Directors
Sandy Kerl, General Manager
Metropolitan Board of Directors
Jeff Kightlinger, General Manager