SUPPLEMENTAL COMMUNICATION
PUBLIC COMMENT

ITEM NO. 7E

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July 10, 2023

Via Email
Coachella Valley Water District Board of Directors
Jim Barrett, General Manager
Jeff Ferre, General Counsel
c/o Sylvia Bermudez, Clerk of the Board
SBermudez@cvwd.org

Re: July 11, 2023 Regular Meeting of the Board of Directors
Protest of Fiscal Year 2024 State Water Project ("SWP") Taxes

To the Board, Mr. Barrett and Mr. Ferre:

This letter is submitted on behalf of Howard Jarvis Taxpayers Association ("HJTA"), for itself, its members and all other Coachella Valley Water District ("CVWD") customers and taxpayers who are affected by the matters discussed herein.

We write to protest and comment on CVWD's proposed SWP tax levy of $0.11 per $100 of assessed value for Fiscal Year 2024 and proposed Resolutions 2023-23 and 2023-24, which are identified as Item 7.D on CVWD's agenda for the upcoming July 11, 2023 Board Meeting.

As you are aware, the Riverside County Superior Court recently entered an order invalidating CVWD's Fiscal Year 2020, 2021 and 2022 SWP taxes in *Howard Jarvis Taxpayers Association v. Coachella Valley Water District*, Master File Case No. RIC1825310. A true and correct copy of the Court's order is attached to this letter as **Exhibit 1**. CVWD's proposed SWP tax for Fiscal Year 2024 is invalid for (among other reasons) the same reasons—it violates the requirements of the Water Code and CVWD's contract with the State Department of Water Resources ("DWR") as well as the constitutional mandates of Proposition 13. The materials posted on CVWD's website regarding the proposed SWP tax for Fiscal Year 2024 (including the draft resolutions, the agenda staff report, and the lengthy technical memoranda created at the request of CVWD's attorneys) demonstrate that the proposed tax fails to comply with the law, among other things, and relies upon blatant mischaracterizations of the Court's order invalidating the tax in prior fiscal years.

HJTA sponsored Proposition 13 forty-five years ago in order to protect taxpayers against escalating property taxes and spendthrift politicians. In particular, Proposition 13 prohibits local government agencies such as CVWD from levying ad valorem property taxes in excess of one (1) percent of the full cash value of the taxpayer's real property, unless the tax is used to pay debt that was expressly approved by the voters prior to 1978. CVWD levies ad valorem property taxes well in excess of Proposition 13's one-percent cap and seeks to justify them as so-called "SWP taxes." CVWD erroneously argues that its "SWP taxes are authorized by Water Code section 11652, part of the Burns-Porter Act voters approved in November 1960 and by Article 34(a) of the District's contract" with the DWR. (Agenda Staff Report, p. 2.)

However, as the Riverside County Superior Court recently confirmed, the voters only approved local property taxes to pay SWP debt "if revenues from water sales were not enough to pay such cost." (Exhibit 1, Order at p. 8 [quoting *Goodman v. County of Riverside* (1983) 140 Cal.App.3d 900, 906 ("*Goodman*")].) "[T]he expectation from the time of adoption was that the SWP would be paid for predominantly, although not exclusively, from user charges. In that context, neither Water Code section 11652 or article 34(a) of the SWP contract can be reasonably interpreted to mean that a SWP contractor can rely upon taxes rather than user charges whenever it chooses to do so. It has discretion, but its discretion is not unbounded." (*Id*.)

SWP property taxes are only authorized when **necessary** to pay the water district's contractual obligations to the DWR, which are in turn used to pay the SWP debt approved by the voters in 1960. "[I]mportantly, allowing taxes to be levied unnecessarily would cast doubt upon the constitutionality of those taxes under article XIIIA [Proposition 13]." (*Id*.) "To the extent that it would be feasible for the SWP contractors to raise the funds to pay their obligations to the DWR through user fees, taxes would not be necessary, and the reasoning of *Goodman* would suggest that those taxes would not fall within the exception to the 1 percent cap on ad valorem taxes." (*Id*.)

Thus, the Court held: "(1) that the district is not authorized to levy taxes to pay its SWP contract obligations unless it is necessary to levy them, (2) that it is 'necessary' only when it is not feasible to raise sufficient funds to satisfy those obligations by user charges alone, and (3) that the district exercises its discretion when deciding the issue of feasibility." (*Id*.) After analyzing the evidence, the Court concluded that CVWD "abused its discretion" by levying SWP taxes that were not necessary to pay its SWP contract obligations to the DWR. (*Id*. at p. 11.) The proposed Fiscal Year 2024 levy would be an abuse of discretion for the same reasons.

None of the materials posted on CVWD's website demonstrate that an $0.11 tax levy is necessary. Indeed, the technical memoranda prepared at the request of CVWD's lawyers never consider whether it would be feasible to raise **some portion** of the required revenue through user charges rather than property taxes. The memoranda instead examine the purported economic impacts of raising **all** of the revenue from replenishment assessment charge ("RAC") rates. This "all or nothing" approach ignores the legal requirements for SWP taxes and fails to consider an appropriate mix of revenue sources for paying CVWD's expenses. (*See id*. [the relevant inquiry

concerns "the degree to which it would be feasible to derive a greater portion of that income from user charges and a lesser portion from taxes"].)

In fact, CVWD has completely failed to consider the feasibility of raising revenues through the RAC rate charged to large agricultural companies in the East Coachella Valley. CVWD officials have admitted in writing that CVWD has deliberately kept the East RAC rate "artificially low" since its inception. The "artificially low" East RAC rate ensures that agricultural companies (including those owned or represented by Board Members John Powell, Peter Nelson and Anthony Bianco) continue to make huge profits. As the Court noted in its order, CVWD's agricultural water rates are "among the lowest in the state" and, as a result, "the Coachella Valley's farmland is ranked among the most profitable crop-growing regions in the state on a per acre basis." (*Id*. at p. 10.)

The RAC rates charged in the West and Mission Creek areas of the Coachella Valley are much higher than the RAC rate charged to agricultural companies in the East. (*See, e.g.,* **Exhibit 2** [Ruling entered in *Howard Jarvis Taxpayers Association v. Coachella Valley Water District*, Master File Case No. RIC1905897] at p. 1.) Yet, CVWD refuses to consider raising the East RAC to pay SWP expenses and ease the burden on taxpayers. The technical memorandum prepared by NBS analyzes raising the Mission Creek RAC rate from $135.52 to $755.79 per acre-foot and raising the West RAC rate from $165.37 to $755.79 per acre-foot, but there is no mention of raising the East RAC rate above $72.27 per acre-foot. (*See* NBS Report at p. 6.)

As justification, CVWD falsely suggests that only the West and Mission Creek areas benefit from the SWP. (*See, e.g*., Findings set forth in proposed Resolution No. 2023-23.) However, CVWD's SWP contract with the DWR is for the benefit of the entire Coachella Valley, and its contractual SWP obligations are district-wide expenses. Moreover, the evidence shows, and the Riverside County Superior Court has found, that the use of SWP water at replenishment facilities in the West benefits the entire Coachella Valley, including the East. (*See, e.g.,* **Exhibit 2** at p. 6 ["HJTA provides evidence that shows replenishment in the West AOB benefits the East AOB due to the flow of groundwater from West to East"].) Yet, CVWD has never even considered raising the artificially low East RAC rate to ease the burden of the property taxpayers who fund 100% of CVWD's district-wide SWP expenses.

In addition, there is no indication that the proposed $0.11 tax levy is necessary to pay CVWD's contractual obligations to the DWR. The Court's order, Water Code § 11652 and article 34(a) of CVWD's contract with DWR all make clear that SWP taxes may only be used to make "payments under the contract." Nothing permits CVWD to divert SWP property taxes to other purposes. Yet, that is exactly what CVWD does, using clever labeling to hide its unlawful expenditures. CVWD states that it uses the tax revenues to pay "SWP expenses" when, in fact, the revenues are diverted to other uses, such as purchasing non-SWP water from other local agencies. As the Court found, "a substantial portion of the expenses claimed by the district to be part of its SWP obligations are not." (Exhibit 1, Order at p. 11.) "Just because there is a line-item labeled 'SWP Allocated Costs' in the budget summary is not persuasive evidence that the District spent the money on authorized SWP expenses." (*Id*. at pp. 11-12.)

This same fatal flaw exists regarding the proposed tax for Fiscal Year 2024. CVWD plans to raise **$90.3 million** in property taxes for purported "SWP expenses" without any clear indication of what those expenses are or whether the voters approved the use of SWP property taxes to pay them. To the extent that such taxes are not necessary to pay CVWD's contractual SWP obligations to the DWR, they are invalid and unconstitutional just like the SWP taxes levied by CVWD in prior fiscal years. HJTA continues to protest CVWD's failure and refusal to follow the constitutional mandates imposed by Proposition 13 and confirmed by the Superior Court, as well as CVWD's ongoing abuses of the SWP system.

Nothing contained or omitted herein or in any other communication shall constitute or is intended to or shall operate as an admission or as an election, waiver or relinquishment of or limitation on any right, remedy or defense, at law or in equity, all of which are reserved.

Sincerely,

Jeffrey Lee Costell

Cc: Michael Colantuono, Esq. (mcolantuono@chwlaw.us)
Pamela Graham, Esq. (pgraham@chwlaw.us)
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Exhibit 1

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

CASE TITLE: Roberts v. Coachella Valley Water District CASE NO.: RIC1825310 MF DATE: March 14, 2023	Department 1	FILED SUPERIOR COURT OF CALIFORNIA COUNTY OF RIVERSIDE MAR 14 2023 L. Howell
PROCEEDING: Tentative Decision on Bifurcated Issue		

The plaintiff – initially, Randall Roberts, and subsequently, the Howard Jarvis Taxpayers Association (hereinafter, the "plaintiff" or "association") – has filed a series of five cases challenging the State Water Project tax (hereinafter, the "SWP tax" or simply the "tax") imposed by the defendant, the Coachella Valley Water District (hereinafter, the "defendant" or "district"): RIC1825310, a petition for writ of mandate; PSC1905977 (a reverse validation action challenging the tax imposed during fiscal year 2020); PSC2003702 (a reverse validation action challenging the tax imposed during FY 2021); CVPS2102910 (a reverse validation action challenging the tax imposed during FY 2022); and CVRI2203364 (a class action seeking a writ of mandate and reverse invalidation of the tax imposed for FY 2023).

All five cases have been consolidated for all purposes, with the oldest case, RIC1825310, designated as the master file. (See, e.g., the orders filed 2-13-20, 7-7-21, and 10-22-21.) The master file was dismissed on 7-7-21 after the Court of Appeal denied a petition for writ of mandate challenging the sustention of the district's demurrer without leave to amend. However, because the consolidated cases are still pending, no judgment has been entered in that case.

Pursuant to a stipulation between the parties, the Court agreed to bifurcate the issues raised by the consolidated complaints. Specifically, the Court ordered that the merits would be tried first, and if the action were found to be meritorious, then the proper remedies would be considered separately. After multiple continuances, the hearing on the merits was conducted on 12-14-22, and taken under submission. Pursuant to California Rules of Court, rule 3.1591(a), the Court submits the following tentative decision.

I. Evidence and Argument Considered

The administrative record ("AR") of the proceedings before the district was lodged on 7-21-22. For the convenience of the Court, an appendix containing only those portions of the AR that were cited in the parties' briefs was subsequently lodged as well. Various declarations were submitted in addition to the AR.

The Court read and considered the plaintiff's opening brief (filed 5-6-22), the district's opposition brief (fled 6-29-22), and the plaintiff's reply brief (filed 7-19-22). In addition, the Court has considered an amicus brief from the State Water Contractors (filed 8-19-22), and the plaintiff's brief in response to the SWC's brief (filed 8-26-22). Counsel for both parties and the SWC appeared at the 12-14-22 hearing.

With its opening brief, Plaintiff asked the Court to take judicial notice of an opinion of the Attorney General, of the plaintiff's governmental claims to the district, of proofs of service of the validation summons by publication, and of various rulings by this Court in this case and in related cases. The request is unopposed. It is granted.

With its reply, Plaintiff requested judicial notice of the District's FY 2021 financial report and the district's FY 2021-22 budget, of excerpts of the District's brief filed in a different case, and of excerpts of the California State Auditor's audit report. The request was filed months ago on July 19, 2022, and the hearing was subsequently continued multiple times (initially from 8-12-22 to 10-11-22, then to 10-28-22, and finally to 12-14-22), but the District has neither objected to the request nor asked for leave to file a sur-reply. Judicial notice is granted as requested.

Plaintiff objects (7-1-22) to the District's expert reports. In particular, it objects to most of the Technical Memorandum prepared by NBS dated June 28, 2022 and to the entirety of the Expert Report prepared by ERA Economics LLC dated June 28, 2022, which are attached as Exhibits 3 and 4 respectively to the Declaration of Pamela K. Graham. The District commissioned these experts to evaluate the economic impact of shifting SWP costs to ratepayers in the future. Plaintiff's relevance objections are sustained. Policy arguments regarding how shifting SWP expenses from the property tax roll to water rates in the future would impact the District's customers are irrelevant to the propriety of the District's actions during FYs 2020-2022.

II. Legal Standards

A. Ordinary Mandate

A traditional or ordinary writ of mandate under Code of Civil Procedure section 1085 is available when the petitioner has no plain, speedy, and adequate remedy; the respondent has a clear, present, and usually ministerial duty to perform; and the petitioner has a clear, present, and beneficial right to performance. (*Conlan v. Bonta* (2002 102 Cal.App.4th 745, 748; *Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 618.) "In general, if an agency acts pursuant to legislative authority, review of the action is by ordinary mandamus" pursuant to section 1085. (*Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 230.) Traditional mandate is also available when a petition challenges an agency's failure to perform an act required by law. (*Conlan, supra.; Wellbaum v. Oakdale Joint Union High Sch. Dist.* (1977) 70 Cal.App.3d 93, 96.)

The trial court reviews an agency's action pursuant to Code of Civil Procedure section 1085 to determine if the agency abused its discretion. (*Klajic v. Castaic Lake Water Agency* (2001) 90 Cal.App.4th 987, 995.) Under this standard, the court may not substitute its judgment for that of the public entity, and if reasonable minds may disagree as to the wisdom of the public entity's discretionary determination, that decision must be upheld. (*Ibid.*) Thus, the judicial inquiry in an ordinary mandamus action addresses whether the public entity's action was arbitrary, capricious, or entirely lacking in evidentiary support, and whether it failed to conform to procedures required by law. (*Neighbors in Support of Appropriate Land Use v. County of Tuolumne* (2007) 157 Cal.App.4th 997, 1004.)

B. Reverse Validation

Code of Civil Procedure sections 860 to 870 authorize *in rem* procedures for determining the validity of certain bonds, assessments or other agreements entered into by public agencies. (*Coachella Valley Water District v. Superior Court* (2021) 61 Cal.App.5th 755, 767.) They allow a public agency to file an action to promptly determine the validity of the agency's acts that fall within the scope of their provisions, referred to as "validation" action. (§ 860.) They also allow any "interested person" to bring an action challenging the validity of such acts, referred to as "reverse" validations actions. (*Id.*; *see also* § 863.) In such actions, courts may invalidate government acts pursuant to any applicable legal authority, including constitutional challenges. (*See e.g., Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409, 416 (challenging charges imposed by water district in a "reverse validation" action).)

In reverse validation actions brought alleging violations of Propositions 13 or 218, the trial court exercises its independent judgment to determine whether the tax or assessment is consistent with the Constitution. (*KCSFV 1, LLC v. Florin County Water Dist.* (2021) 64 Cal.App.5th 1015, 1022; *Silicon Valley Taxpayers' Ass'n, Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 445, 448.) "A local agency acting in a legislative capacity has no authority to exercise its discretion in a way that violates constitutional provisions or undermines their effect." (*Ibid.*) Thus, unlike in a typical mandamus proceeding in which the trial court applies a deferential standard of review to the agency's action, the trial court exercises its independent judgment in determining whether the agency violated Propositions 13, 218, or 26. (*Id.* at p. 448-450.)

In this case, Plaintiff challenges the District's actions that implicate both constitutional and non-constitutional issues. The standard of review in this case will depend on the issue.

III. Legal Background

A. The State Water Project and the Burns-Porter Act

The State Water Project ("SWP") is a water storage and delivery system comprised of dams, reservoirs, power plants, and pumping plants to transport water from Northern to Southern California. (*Goodman v. County of Riverside* (1983) 140 Cal.App.3d 900, 903.) The SWP is financed in part by state bonds issued under the California Water Resources Development Bond Act, commonly known as the Burns-Porter Act, codified at Water Code sections 12930-12944 (the "Act"). (*Ibid.*) California voters passed the Act in November 1960 to provide for the financing and construction the SWP. The Act directs the California Department of Water Resources ("SWR") to enter into contracts with local water districts for the sale and delivery of SWP water. (*Ibid.*)

The water supply contracts between DWR and the 29 SWP contractors are substantively identical and require regular payments to the state in return for participation in the SWP system. (*Coachella Valley Water District, supra,* 61 Cal.App.5th at 761.) Not all the water districts actually receive water, but all must make payments according to their respective maximum annual water entitlements and the portion of the system required to deliver such entitlements. Those which actually receive water also pay amounts attributable to the water received. (*Goodman, supra,* 140 Cal.App.3d at 904.) The payments under these contracts service the bonds issued to

finance the construction of the system and pay the operating costs of the SWP. (*Coachella Valley Water District, supra,* 61 Cal.App.5th at 761.)

The district is a public water agency that manages and provides water to 100,000 customers in the Coachella Valley. (*Coachella Valley Water District, supra,* 61 Cal.App.5th at 760.) As a local water district, it has the power to set water rates and to levy taxes on property within the district to satisfy its debts and expenses. (*Ibid.*) It has a water supply contract with the DWR for SWP water, and thus is one of the 29 SWP Contractors. (*Ibid.*)

B. History of Propositions 13, 218, and 26

Since 1978, California voters have adopted a series of initiatives designed to limit the authority of state and local governments to impose taxes without voter approval. The series began with the passage of Proposition 13 in 1978, by which the voters added article XIII A to the California Constitution to limit local government authority to increase real property taxes. (*Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 872.) Subject to certain exceptions, Proposition 13 prohibits ad valorem property taxes in excess of one percent of the full cash value of the real property. (Cal. Const., art. XIII A, § 1; *Howard Jarvis Taxpayers Association v. County of Orange* (2003) 110 Cal.App.4th 1375, 1377.) To prevent local governments from evading the tax limitations, Proposition 13 also requires approval of local special taxes by a 2/3 vote of the electorate. (Cal. Const., Art. XIIIA, §4; *Howard Jarvis Taxpayers Association v. City of Riverside* (1999) 73 Cal.App.4th 679, 681-682; *City & County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 49-50.) Special taxes are "taxes which are levied for a specific purpose rather than . . . a levy placed in the general fund to be utilized for general governmental purpose." (*Farrell, supra*, 32 Cal.3d at p. 57.)

Thereafter, some local governments tried to avoid Proposition 13 through the use of assessments, fees and charges. (Flavin, *Taxing California Property* §2:40 (4th Ed. 2021 Westlaw).) In response, the voters approved Proposition 218 in 1996. Known as the "Right to Vote on Taxes Act," it added Articles XIII C and XIII D to the California Constitution. (*Apartment Association of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 837; *Howard Jarvis Taxpayers Association v. City of Fresno* (2005) 127 Cal.App.4th 914, 918.) "Proposition 218 allows only four types of local property taxes: (1) an ad valorem property tax; (2) a special tax; (3) an assessment; and (4) a fee or charge." (*Apartment Association, supra*, 24 Cal.4th at 837, citing Cal. Const. Art. XIII D, §3(a).) Under Proposition 218, all taxes by local government are deemed either general taxes or special taxes. (Cal. Const., art. XIII C, § 2(a).) Local governments may not impose, increase or extend: (a) any general tax, unless approved by a majority vote at a general election, or (2) any special tax, unless approved by a two-thirds vote. (Cal. Const., art. XIII C, § 2, subd. (b), (d).)

Curiously, Proposition 218 did not define the term "tax." That omission was cured in 2010, when voters passed Proposition 26, which made two changes to article XIII C. First, it broadly defined "tax" to include "any levy, charge, or exaction of any kind imposed by a local government" that does not fall within one of seven enumerated exceptions. (Cal. Const., art. XIII C, § 1(e); *Jack v. City of Santa Barbara* (2017) 3 Cal.5th 248, 260.) In addition, Proposition 26 put the onus of proving that the charge was not a tax on the agency that imposed it: "The local

government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of a governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." (Cal. Const., art. XIII C, § 1(e).)

C. *Goodman v. County of Riverside*

Although Proposition 13 prohibits ad valorem taxes in excess of one percent (1%) of the value of the real property, the limitation does not apply to ad valorem taxes "to pay the interest and redemption charges on any . . . indebtedness approved by the voters prior to July 1, 1978." (Cal. Const., art. XIIIA, § 1(b)(1).) "The purpose of Article XIIIA is to restrict ad valorem real property taxes, while at the same time honoring already-approved debts." (*Goodman v. County of Riverside, supra,* 140 Cal.App.3d at p. 907.)

In *Goodman*, property owners filed an action against the county to recover real property taxes levied by a local water agency to fund the agency's SWP payment obligations, alleging that the levy and collection of such taxes violated the 1% ad valorem real property taxation restriction embodied in Proposition 13 and Article XIII A, § 1(a). The agency's "board of directors had found that the tax levied was the minimum amount necessary to be raised by taxation, after DWA had relied, to the extent feasible, on pumping and user charges." (Id., p. 911.) The court held that such taxes came within the prior indebtedness exception to the property tax restriction under Article XIII A, § 1(b)(1), explaining that "when the state's voters approved the Burns-Porter Act, they approved an indebtedness in the amount necessary for building, operating, maintaining, and replacing the Project, and that they intended that the costs were to be met by payments from local agencies with water contracts. Further, we conclude that the voters necessarily approved the use of local property taxes whenever the board of directors of the agencies determined such use to be necessary to fund their water contract obligations, and that the ad valorem taxes levied by [the local agency] fall within the exception of section 1, subdivision (b)." (*Goodman, supra,* 140 Cal.App.3d at 910.) Thus, under *Goodman*, taxes levied by local agencies to fund payment obligations under SWP contracts are exempt from Proposition 13's restriction on ad valorem property taxes.

IV. Analysis

Plaintiff does not dispute that the District is entitled to levy ad valorem taxes to pay for its SWP obligations. Rather, Plaintiff argues that 1) the District levied the SWP taxes without first making a determination that such taxes are necessary in violation of Water Code § 11652 and Article 34 of the SWP contract; 2) the District failed to keep a separate accounting of SWP funds in violation of Gov. Code § 53724 and Water Code § 116541; and 3) the SWP taxes collected by the District are not actually used to pay for SWP expenses, and instead are diverted for other purposes in violation of Proposition 13's one percent cap on property taxes, and Propositions 218 and 26 which require voter approval for tax increases.

Preliminarily, the Court does not consider Plaintiff's arguments and evidence regarding the District's actions from FY 2013-2019. As pointed out by the District, the Court of Appeal already

determined these challenges are time-barred. (*Coachella Valley, supra,* 61 Cal.App.5th 755.) What is at issue are the District's actions in FY 2020 through FY 2023.

A. Determination of Tax Necessity and Alternative Sources of Revenue

1. The District's Discretion Is Limited by the Necessity Requirement

Plaintiff seeks to invalidate Resolution Nos. 2019-19, 2020-09 and 2021-08 based on the District's alleged failure to first determine the necessity of the SWP taxes and alternative sources of revenue such as water charges. Plaintiff's challenge to the District's actions based on the alleged violation of Water Code § 11652 and the SWP contract is subject to the "abuse of discretion" standard. (*Klajic v. Castaic Lake Water Agency, supra,* 90 Cal.App.4th at 995.) The court reviews the agency's action to determine whether it was arbitrary, capricious, or entirely lacking in evidentiary support, and whether it failed to conform to procedures required by law. (*Ibid.*) "Legislative acts of a local public agency are to be presumed valid." (*Goodman, supra,* 140 Cal.App.3d at 911-912.) In light of that presumption, the burden is on Plaintiff to show that the Board acted improperly. (*Id.* at 912.)

The ballot argument in favor of the Burns-Porter Act represented to the voters that the project would "pay for itself" from revenues derived from the sale of water and power. (See the AG opinion, RJN, Ex. 1, p. 11, quoting from the ballot pamphlet.) Nevertheless, it was understood "that local property taxes, in addition to user charges, were available if revenues from water sales were not enough to pay such cost." (*Goodman, supra,* 140 Cal.App.3d at 906.)

Accordingly, Water Code section 11652 provides:

> The governing body shall, whenever necessary, levy upon all property in the state agency not exempt from taxation, a tax or assessment sufficient to provide for all payments under the contract then due or to become due within the then current fiscal year or within the following fiscal year before the time when money will be available from the next general tax levy.

"State agency" is defined to include a water district. (Wat. Code, § 11102.)

Article 34(a) of the District's SWP contract with the DWR is consistent with Water Code section 11652. That article provides as follows: "If in any year the District fails or is unable to raise sufficient funds by other means, the governing body of the District shall levy upon all property in the District not exempt from taxation, a tax or assessment sufficient to provide for all payments under this contract then due or to become due within that year." (AR 163:6295.)

The Supreme Court has succinctly summarized the situation:

> Under the Burns-Porter Act (Wat. Code, §§ 12930- 12944), the costs of building, operating and maintaining the state water project as well as the cost of payment of interest and principal on the bonds issued to pay costs of construction were to be paid from the proceeds of contracts for delivery of water entered into between the Department of Water Resources and local water agencies. Each contract provided that the local agency would use its taxing powers, if necessary, to obtain the funds to make the payments required by the contract.

(*Patton v. City of Alameda* (1985) 40 Cal.3d 41, 45.)

Plaintiff contends that "[a]n SWP contractor is only authorized to levy SWP taxes in those years when its Board determines that such taxes are necessary to pay the district's SWP obligations to the DWR because sufficient funds could not be raised through non-tax revenue sources," citing Attorney General Opinion, 61 Ops. Cal. Atty. Gen. 373 (Cal. A.G. 1978), 1978 WL 22778 (Opening Brief, p. 11.) Absent controlling authority, the Attorney General's opinion is entitled to considerable weight, but it is not binding. (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 717, fn. 14.) More importantly, however, the AG's opinion does not stand for the exact proposition urged by the plaintiff.

Section 1(b) of article XIIIA provides: "The [1%] limitation provided for in subdivision (a) shall not apply to ad valorem taxes or special assessments to pay the interest and redemption charges on any indebtedness approved by the voters prior to the time this section becomes effective." The DWR asked the AG whether SWP taxes fall within that prior-indebtedness exception. The Attorney General concluded that the SWP taxes fell within the exception: "Property taxes levied by local water districts necessary to provide for payments to the state under the state water supply contracts fall within section 1(b) of article XIIIA of the California Constitution." (RJN, Ex. 1, p. 1.)

On the issue of the reliance on property taxes versus reliance on proceeds from the sale of water to satisfy a contractor's SWP obligations, the AG opined that both the "Act and water contracts under that act do contemplate that local taxes may be required to pay the obligation to the state, and authorize such taxation. However, that authority is expressly limited to situations where it is necessary." (*Id.*, p. 11, citing to Water Code § 11652 and article 34(a) of the contract.) The AG concluded that "the Burns-Porter Act, interpreted in light of article XIIIA, requires local districts to make state water contract payments from charges rather than taxes wherever possible." (RJN, Ex. 1 at p. 13.)

By drawing a distinction between what is possible and what is not, that sentence supports the plaintiff's argument that ad valorem taxes may be imposed only when it is impossible to raise the necessary funds through water charges. But when he summarized his opinion, the AG turned from the fairly black-and-white issue of what is possible to the more subjective issue of what is feasible: "[T]he local district should rely first on water charges whenever feasible." Moreover, the opinion ultimately recognizes that the decision as to what constitutes necessity or feasibility is a legislative question for the contracting agency: "The question of feasibility is not susceptible to resolution by a general mechanical formula, but rests within the sound discretion of each local district." (*Ibid.*)

In resisting this analysis, the district construes article 34(a) of the SWP contract to mean that a SWP contractor may impose taxes in two situations: (1) if the agency was unable to raise sufficient funds through a user charge; and (2) if the district simply decided not to impose a user charge that would do so. (Oppo., pp. 22-23.) To the same effect, the State Water Contractors argue that Water Code section 11652 and article 34(a) of the contract authorize SWP contractors to levy taxes when necessary, but do not limit their authority to do so when it is not necessary. (SWC brief, p. 4.)

The Court is not persuaded, for a number of reasons. First, by specifying that taxes must be levied if necessary (as Water Code section 11652 expressly does and as the Supreme Court's opinion in *Patton v. City of Alameda, supra,* 40 Cal.3d at p. 45, interprets the contract to say), the language of both the statute and the contract implicitly provide that, in the absence of necessity, the district lacks such authority. A maxim of contractual interpretation is *expressio unius est exclusio alterius*, i.e., the mention of one thing implies the exclusion of another thing. (*Estate of Banerjee* (1978) 21 Cal.3d 527, 532, fn. 2.) It is an elementary rule of construction (*Estate of Pardue* (1937) 22 Cal.App.2d 178, 181) that applies to the construction of both statutes and contracts (*White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870, 881-882, fn. 4).

Second, that inference is strengthened by the context of the statutory scheme that the SWP contracts are designed to implement. As *Goodman* holds, "it clear before the election that *all* costs of the Project were contemplated as costs to be repaid by the revenues and income from the [State Water Resources Development] System" in which each of the SWP contractors would participate. (140 Cal.App.3d at p. 908.) In particular, the electorate understood "that contract payments [from the SWP contractors] would pay for the cost of the entire Project, and that local property taxes, in addition to user charges, were available *if revenues from water sales were not enough to pay such cost.*" (*Id.*, p. 106, emphasis added.) In short, the expectation from the time of adoption was that the SWP would be paid for predominantly, although not exclusively, from user charges. In that context, neither Water Code section 11652 or article 34(a) of the SWP contract can be reasonably interpreted to mean that a SWP contractor can rely upon taxes rather than user charges whenever it chooses to do so. It has discretion, but that discretion is not unbounded.

Third and most importantly, allowing taxes to be levied unnecessarily would cast doubt upon the constitutionality of those taxes under article XIIIA. "The purpose of [section 1 of] Article XIIIA is to restrict ad valorem real property taxes, while at the same time honoring already-approved debts." (*Goodman v. County of Riverside, supra,* 140 Cal.App.3d at p. 907.) In holding that SWP taxes came within the scope of the exception for already-approved debts, *Goodman* held that when the Act was adopted, "the voters necessarily approved the use of local property taxes whenever the boards of directors of the agencies determined such use to be *necessary* to fund their water contract obligations . . . ." (*Id.*, p. 910, emphasis added.) The *Goodman* court did not say that taxes that were not necessary to fund the SWP contractors' obligations also qualified for the exemption provided by section 1(b) of Article XIIIA. To the contrary, as noted previously, the *Goodman* court noted that the agency in that case "had found that the tax levied was the minimum amount necessary to be raised by taxation, after DWA had relied, to the extent feasible, on pumping and user charges." (Id., p. 911.) To the extent that it would be feasible for the SWP contractors to raise the funds to pay their obligations to the DWR through user fees, taxes would not be necessary, and the reasoning of *Goodman* would suggest that those taxes would not fall within the exception to the 1 percent cap on ad valorem taxes.

In sum, the Court finds (1) that the district is not authorized to levy taxes to pay its SWP contract obligations unless it is necessary to levy them, (2) that it is "necessary" only when it is not feasible to raise sufficient funds to satisfy those obligations by user charges alone, and (3) that the district exercises its discretion when deciding the issue of feasibility.

2. Whether the District Considered Raising Water Rates Rather than Levying Taxes

As the district notes (Oppo., pp. 20-22), the district is not required to make an express finding of necessary. "Code of Civil Procedure section 1085 does not require an agency to make findings to support its legislative and quasi-legislative decisions unless another statute specifically requires findings." (*Walker v. City of San Clemente* (2015) 239 Cal.App.4th 1350, 1369.) Nothing in the Act, the rest of the Water Code, the Attorney General's opinion, *Goodman*, or the district's contract requires the district to make such an express finding.

That the district found that it was necessary to supplement water charges with property taxes is implied from the fact that the district imposed those taxes. The remaining question, therefore, is whether the District abused its discretion by deciding that the imposition of taxes was necessary. The District's exercise of its discretion is entitled to deference unless it is arbitrary, capricious or entirely lacking in evidentiary support. The burden of proving such an abuse of discretion rests on the plaintiff. (*Goodman*, *supra*, p. 912.)

Plaintiff contends that the District never even considered raising SWP revenues through agricultural water rate increases. In support of that contention, it cites to testimony of Mr. Barrett, who was the district's manager at the time that the tax rates were adopted for FY 2020, 2021, and 2022. (AR1993-1994, 10763-10764, 15093-15094.) Barrett testified that, during his tenure, the district's staff has never determined that it was necessary to levy a SWP tax in a certain amount in order to pay SWP invoices rather than relying on increased water rates (Opening Brief, p. 28, citing to Decl. of Stambaugh, Ex. 1, p. 48) and that he was not aware that anyone on the board or any staff member had considered the possibility of increasing agricultural water rates rather than relying upon property taxes (*id.*, p. 286).

Those assertions are corroborated by the staff recommendation that was prepared for the 6-25-19 hearing at which the tax rate for FY 2020 was being considered. (AR 1993-1994.) The recommendation projected SWP expenses of $71 million, estimated that a tax rate of $0.10 per $100 valuation would generate $68 million, and recommended that such a rate be adopted. (*Ibid.*) Nowhere in the recommendation is any mention of the amount of user charges that would be collected during the year, or any reason why the expenses described could not be raised through an increase in the water rates. Indeed, the water rates were not mentioned anywhere in the recommendation at all. (*Ibid.*) The district concedes that the staff recommendation was adopted without debate. (Oppo., p. 25.)

The staff recommendation for the next fiscal year, 2021, prepared for the board meeting on 6-9-20, was substantially the same. (AR 10763-10764.) It projected SWP expenses of $69.7 million, estimated that a tax rate of $0.10 per $100 valuation would generate $69.9 million, and recommended that such a rate be extended for FY 2021. (*Ibid.*) Once again, there is no reference whatsoever to the water rates, and no indication that an increase in the water rate was an option to be considered. The district again concedes that the staff recommendation was adopted without debate. (Oppo., p. 25.)

A year later, the staff recommendation for FY 2022 was considered on 4-13-21. (AR 15093-15094.) Staff projected expenses of $72.7 million, estimated that an increased tax rate of $0.11 per $100 would generate $78.5 million in revenues, and recommended that the increased rate be adopted. It did mention a recommended "adjustment" to the West Replenishment Assessment Charge being considered in conjunction with a cost of service study, but otherwise was silent as to whether raising water rates was an alternative, feasible or not, to raising property taxes. Certainly, there is nothing in the staff's recommendation concerning the possibility of raising the East RAC. However, the resolution adopting the resolution recites a general finding "that reliance on charges for water service alone will be insufficient to fund" SWP contractor obligations for that fiscal year. (AR 15127.)

Whether an issue has been considered by an agency's board is a slippery concept. Resolution of that issue necessarily relies on what has been written and what has been said, when the actual issue is what is in the mind of the board members. Accordingly, the Court declines to base its decision on whether the feasibility of raising water charges was considered.

3. Whether the District's Findings of Necessity Are Supported by Evidence

The district argues that its findings of necessity, whether express or implied, are supported by substantial evidence. (Oppo., pp. 26-28.) The Court disagrees.

An option is infeasible if it is impractical, unworkable, counterproductive, or otherwise illogical. To justify a practice that relies predominantly on taxes to cover SWP expenses rather than user charges, there must be evidence that it is infeasible to impose or to increase user charges in order to reduce or eliminate taxes. For instance, an increase in water rates might be considered to be infeasible if the increase would put water out of the financial reach of the users, or if the rate being considered would be higher than rates charged elsewhere, putting the user at a competitive disadvantage. Either scenario might result in a reduction in income to the district despite the higher rates.

The evidence here suggests that the neither of those situations exists. According to the district itself, the rate it charges for agricultural water "is among the lowest in the state." (AR05816.) As a result, "[t]he Coachella Valley's farmland is ranked among the most profitable crop-growing regions in the state on a per acre basis." (AR05811.)

Certainly, the Court has not been directed to any evidence of infeasibility.[1] For instance, for FY 2020, the district relies on several pages of staff reports: AR 1934, 1958-1962, 1993, and 1996. Nothing in any of those documents appears to address the issue of whether it would be feasible to increase water rates rather than rather than levy taxes at the same rate as the year before. Certainly, nothing in those pages provides an evidentiary basis for a conclusion that it would be infeasible to do so.

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[1] As noted above, the Court sustained the plaintiff's objections to the district's two expert reports that seek to retroactively justify decisions made by the district years before the reports were produced. Accordingly, the Court does not consider the portion of the district's argument that is based on that excluded evidence. (Oppo., pp. 31-33.)

For FY 2021, the district cites to AR 10661, 10689-10691, 10682, 10763, and 10772. Those pages review the proposed budget for the upcoming fiscal year, and explain that the district's obligations to the SWP are expected to increase. But they do not explain why, and provide no evidentiary support for the conclusion that, it would be infeasible to fund that increase by increasing water charges rather than continuing to levy taxes at the rate of $0.10 per $100.

For FY 2022, the district cites to AR 14809, 14814, 14837, and 15096. Those documents indicate that the board decided to increase the tax from $0.10 to $0.11 districtwide, in part to establish a $20 million reserve. However, nothing in those records provides an evidentiary basis supporting the conclusion that it would be infeasible to fund a reserve by increasing water changes districtwide rather than increasing taxes districtwide.

Arguably, all of these records support the conclusion that the district's expenses were remaining approximately the same if not increasing, and that therefore the district needed the same or greater level of income as compared to the year before. But that is not the issue. The issue is not whether the district needed a particular level of income, but rather the degree to which it would be feasible to derive a greater portion of that income from user charges and a lesser portion from taxes. None of the evidence cited by the district touches on that issue, much less supports the conclusion that it would be infeasible.

The Court's analysis to this point has presumed that all of the expenses for which the taxes were being levied were truly expenses that the district was obligated to pay pursuant to its SWP contract. In fact, however, it appears that a substantial portion of the expenses claimed by the district to be part of its SWP obligations are not. (See discussion under part C, below.) For that reason as well, the findings of necessity are not supported by substantial evidence.

The Court concludes that the district's findings that it was necessary to continue to levy taxes at the rate of $0.10 in FY 2020 and FY 2021, and to levy taxes at the increased rate of $0.11 districtwide in FY 2022, are not supported by evidence. Accordingly, the Court finds that the district abused it discretion in levying those taxes in those three years.

B. Whether the District Separately Accounted for SWP Funds

Government Code section 53724 provides that "revenues from any special tax shall be used only for the purpose or service for which it was imposed, and for no other purpose whatsoever." More specifically, Water Code section 11654 provides:

> All money collected for tax or assessments under this article shall be kept in a separate fund by the treasurer or other officer of the state agency charged with the safekeeping and disbursement of funds of the state agency, and, upon written demand of the department, the treasurer or other officer shall pay over to the department all such money in his possession or control and the money shall be applied by the department to the satisfaction of the amount due under the contract.

As noted previously, "state agency" is counterintuitively defined to include a local water district. (Wat. Code, § 11102.) A provision substantially identical to section 11654 is included in the District's SWP contract with the DWR at Article 34(c). (AR 163:6295.) Thus, the District was

statutorily and contractually required to maintain a separate fund for purposes of collecting and spending SWP taxes.

The District admits that it commingled SWP funds with the Groundwater Replenishment Fund during FY 2013 through FY 2019, but contends that "it reconstituted its SWP Fund in FY2020" by shifting various capital assets, funds, and income streams, and therefore complied with section 11654 during all times at issue in this action. (Oppo., p. 29.) However, the district does not say, and does not point to any evidence in the record that establishes, the date on which those changes were implemented. Instead, it relies on year-end financial statements, that indicate only that the various transfers occurred sometime during the year ending 6-30-20.

If those corrective actions were taken at the end of the prior fiscal year, or even on the first business day of FY 2020, then the Court could agree that the district complied during all or substantially all of FY 2020. If it were not done until sometime later, then the district would not have complied during the entire year.

The district appears to concede that it was done later: "Although CVWD initially allocated SWP Tax revenues to the West and Mission Creek Replenishment Funds in [FY 2020] (AR 5453, 5462), it ultimately allocated all SWP Tax revenues to the reconstituted SWP Fund." (Oppo., p. 30.) If the tax revenues were only "ultimately" allocated to the reconstituted SWP fund, it would appear either that the reconstitution of that fund had not occurred at the beginning of that year or that the tax revenues were initially put into a replenishment fund and later transferred into the SWP fund.

From that statement, and from the district's failure to provide any more specific information, the Court interprets the district's admission that it made those changes "in FY2020" (rather than "at the beginning of FY 2020" or "on the first day of FY 2020") to be an admission that the changes were not implemented until sometime after that fiscal year began. Therefore, the Court finds that there was at least some period during FY 2020 in which the district failed to comply with section 11654 and article 34(c).

C. District's Use of SWP Taxes in FY 2020-2022

Under *Goodman*, the pre-approved indebtedness exception (Article XIII A, § 1(b)(1)) to Proposition 13's one percent limitation on property taxes applies when "necessary to fund [the district's] water contract obligations." (*Goodman,* 140 Cal.App.3d at 910; and see Article 34(a) [the local water agency shall levy taxes "sufficient to provide for all payments under this contract then due or to become due within that year."].) This exception "is to be strictly construed." (*Howard Jarvis Taxpayers Assn. v. County of Orange* (2003) 110 Cal.App.4th 1375, 1384.)

For FY 2020, FY 2021 and FY 2022, the only evidence identified by the District as meeting that burden is limited to its *budgets* summarizing projected SWP revenues and SWP expenses for the upcoming fiscal year, and a statement summarizing the actual SWP revenues and expenses for 2020. (Opposition, p. 30, citing AR 141:5388, AR 142:5850 & 5785; AR 391:15129 & 15137.) These summaries reveal absolutely nothing about how the District expended (or intended to expend) SWP funds. Just because there is a line-item labeled "SWP Allocated Costs" in the budget summary is not persuasive evidence that the District spent the money on authorized

SWP expenses. The District failed to point to any evidence of actual SWP expenses for FY 2021 or FY 2022 and failed to show any breakdown of the $67-71 million expenditures in any manner. Although the District points to a handful of DWR invoices in FY 2022 (see Opposition p. 29, citing AR 19032-35, AR 19037, AR 19041-19046), there is no evidence showing the entirety of SWP expenditures. Notably, Plaintiff does not challenge the portion of SWP taxes spent on actual SWP expenses – only non-SWP expenses under the guise of SWP expenses.

In its reply, the plaintiff persuasively points to the District's expert report by NBS at Appendix Table A1: "SWP Fund Expenditures." (Declaration of Pamela K. Graham, Ex. 3, p. 14.) This table breaks down the District's actual SWP expenditures for FY 2020-2022, including a column for "Direct SWP Payments to SWR," a column for "SWP Related Payments to Others," and "Other." The payments to "SWP Related Others" include:

> FY 2020: a total amount of $12.5 million to Desert Water Agency, MWD 15000 AF Conservation, MWD 35000 AF Non SWP, GLC/Rosedale, and Delta Conveyance Project.
>
> FY 2021: the net amount of $18.5 million to Desert Water Agency, MWD 15000 AF Conservation, MWD 35000 AF Non SWP, SWP Portion of MWD, GLC/Rosedale, and Sites Reservoir.
>
> FY 2022: a total amount of $26.5 million to Desert Water Agency, MWD 15000 AF Conservation, MWD 35000 AF Non SWP, SWP Portion of MWD, GLC/Rosedale, Sites Reservoir and Delta Conveyance Project.

(*Id.*) The payments to "Others" include:

> FY 2020: a total of $81,333 to Professional Services, DWA Hydro and Payment to Other Agencies.
>
> FY 2021: a total of $108,719 to Professional Services, Permits and Fees, and DWA Hydro
>
> FY 2022: a total of $80,000 to DWA Hydro.

(*Id.*)

At the hearing, the district argued that the categories used by the expert -- Direct SWP Payments to SWR, SWP Related Payments to Others, and Other – are not determinative of whether the expenses described are obligations under the SWP contract. (RT 98.) But even if the Court were to ignore that chart and that categorization, the district's audited financial statements support the conclusion that the taxes are not be used solely for SWP expenses. (RJN, Ex. 12, p. 36.) In describing "State Water Project Revenues & Expenses," they show that revenues exceeded expenses in both FY 2020 (by approximately $20 million) and FY 2021 (by at least $30 million). Since no $50 million SWP reserve exists, it is inescapable both that the amount of taxes being levied is unnecessary and that tax revenues are being spent on non-SWP expenses.

The Court finds that the SWP taxes collected for FY 2020-2022 were not used exclusively for SWP expenditures. SWP taxes levied by the District for purposes other than SWP expenses violate Proposition 13's one percent cap on property taxes.[2]

Accordingly, that portion of the petition that seeks relief based on the District's levy and diversion of SWP taxes for purposes other than SWP expenses in FY 2020, FY 2021 and FY 2022 is granted. The identification and quantification of each improper expenditure shall be determined during the remedies phase of trial.

This tentative decision shall become final unless a timely request is made for the preparation of a statement of decision.

Craig G. Riemer, Judge of the Superior Court

[2] Plaintiff also complains that the District used SWP reserves (i.e., from taxes collected during FY 2013-2019) to pay for non-SWP expenses in FY 2020 in further violation of Propositions 13, 218 and 26. While the evidence suggests this may be the case (AR 391:15134-15136; AR 406:16280), any improper use of these funds is not tied to Resolution Nos. 2019-19, 2020-09 and 2021-08 for which Plaintiff seeks reverse validation. At the hearing, the plaintiff argued that, because a portion of those reserves still existed in FY 2020, and were being held outside the SWP account, they should be "a part of" the plaintiff's remedies. The resolution of that assertion shall be reserved for the remedies phase of this trial.

Exhibit 2

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE

TITLE:	DATE & DEPT.	NUMBER
ROBERTS VS COACHELLA VALLEY WATER	April 21, 2022 Dept. 06	RIC1905897
COUNSEL	**REPORTER**	
Please see attached Clerk's Certificate of Mailing	None Present	
PROCEEDING		
RULING		

Plaintiff's requests for judicial notice is GRANTED as to exhibits 9, 10, 14-16, 19-20, 21-23, and 25-27.

Plaintiff's requests for judicial notice is DENIED as to exhibits 1-8, 11-13, 17-18, 24, and 28-29.

The Petition is GRANTED.

There is one aquifer beneath the Coachella Valley. The CVWD divides its service area into three "Areas of Benefit" (AOB). The Whitewater Subbasin is divided into "West" and "East" areas of benefit.

Customers are charged Replenishment Assessment Charges (RAC). These rates are assessed to pay costs associated with replenishment of CVWD's groundwater supply. These rates are not uniform among the different areas of benefit. Customers in the East AOB are charged RAC rates of $72.27 per acre-foot, while customers in the other AOBs are charged $165.37 per acre-foot.

HJTA argues that there is no legal basis for the difference in RAC rates and the East AOB pays significantly less to purposely, and unlawfully, benefit large agricultural water users at the expense of domestic water customers. By way of the instant writ petition, HJTA seeks to invalidate CVWD's RAC rates. HJTA argues the RAC rates violate Propositions 218 and 26, constitutional due process and equal protection clause, as well as California public policy. HJTA seeks a writ of mandate under CCP §1085 directing CVWD to stop collecting and enforcing the RAC rates, to comply with its duties under applicable law and policy, and to make restitution to all ratepayers who were overcharged through CVWD's RAC rates.

CVWD opposes the petition. CVWD asserts the RAC is a levy on those who pump groundwater based on the volume they pump to fund groundwater replenishment. CVWD argues that the RAC rates are subject to Prop 26, rather than Prop 218, and that the RACs comply with Prop 26 because they do not exceed the reasonable costs to CVWD of replenishment within each AOB. CVWD argues the West AOB receives significantly more imported water than the East AOB, which necessitates that the West AOB rates be higher. CVWD asserts that just because there is more than one way to fund groundwater replenishment, it does not mean that the method CVWD's Board chose is unconstitutional. Even if Prop 218 applied, which CVWD argues it does not, CVWD contends the RAC rates would not violate that Proposition either. Additionally, CVWD contends its RAC rates do

S. SYKES, Judge.
L. Howell (vis), Clerk

not violate due process, equal protection, or California public policy. Finally, CVWD asserts that Petitioner lacks standing to challenge RAC rates they do not pay.

Standing

CCP §863 permits "any interested person" to bring a reverse validation action. The California Supreme Court has defined this phrase to include "a party contesting the matter in question." (*Bonander v. Town of Tiburon* (2009) 46 Cal.4th 646, 656.) In *Citizens Against Forced Annexation v. County of Santa Clara* (1984) 153 Cal.App.3d 89, 96, an unincorporated association composed of taxpayers, residents, landowners and/or registered voters in Santa Clara County filed an action challenging the validity of more than 125 annexations of territories to San Jose that were accomplished without elections. The court found the association had standing to challenge the annexations of various disputed territories based on the allegations that various specifically named original plaintiffs, who had an interested relationship with the disputed territories, were members of the association. In supporting its decision, the court noted the "broad language of section 863 of the Code of Civil Procedure, the nature of [the association], the specifically alleged interests of certain of its members, and the nature of a validation action." (*Citizens Against Forced Annexation v. County of Santa Clara*, 153 Cal.App.3d at 96.)

In support of the instant brief, Plaintiff provides the declaration of Laura Dougherty, a staff attorney for HJTA. She notes that HJTA has at least 19,085 members who reside within the boundaries of, and are customers of, the CVWD. This includes members who are domestic water customers of CVWD and who pay the charges that are being challenged in the instant action. (Dougherty Decl. ¶3.) Under the reasoning in *Citizens Against Forced Annexation*, discussed above, this is sufficient to grant HJTA standing to bring the instant claim. Additionally, the broad language of CCP §863 and the CA Supreme Court's note in *Bonander* indicates that §863 intends to allow interested parties under a broad definition to bring claims of this nature.

Proposition 218

Prop 218 only applies to assessments (Cal. Const. art. XIII D, § 4) and fees/charges. (Cal. Const., art. XIII D, § 6.) A fee or charge is "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service." (Cal. Const., art. XIIID, §2(e).)

In *Buenaventura*, the California Supreme Court defined a fee as something "charged for a 'property-related service,' and is thus subject to article XIII D, if it is imposed on a property owner, in his or her capacity as a property owner, to pay for the costs of providing a service to a parcel of property." (*City of Buenaventura v. United Water Conservation District* (2017) 3 Cal.5th 1191, 1208 ("*Buenaventura*").) The Court made an important distinction though – "not all fees associated with obtaining water are property-related fees within the meaning of article XIII D." (Id. at 1208.) The California Supreme Court in *Bighorn* held that fees for supplying water through an established connection are property-related service fees. (*Bighorn-Desert View Water Agency v. Verjil (2006) 39 Cal.4th 205, 214 ("Bighorn").)* However, the *Buenaventura* court held that charges for the service the District provided in that case, like the conservation of limited groundwater stores and

remediation of the adverse effects of groundwater extraction, were not property-related in the same way. (*Buenaventura, supra*, 3 Cal.5th at 1208.) Conserving and replenishing groundwater that flows through an interconnected series of underground basins, none of which correspond with parcel boundaries, does not constitute delivering water to parcels. The court noted these "basins are managed by the District for the benefit of the public that relies on groundwater supplies, not merely for the benefit of the owners of land on which wells are located." (*Buenaventura, supra*, 3 Cal.5th at 1208.)

CVWD describes the RAC rates as: "The [RAC] is a levy on those who pump groundwater – such as water agencies, golf courses, homeowners' associations, and agriculture – based on the volume they pump to fund groundwater replenishment. (AR 33083, 33088.) CVWD replenishes groundwater for beneficial uses with imported water directly, via recharge (or spreading) basins, and indirectly by inducing those who pump groundwater to use other supplies, like Colorado River Water imported through the Coachella Canal and recycled water." Resolutions from the CVWD Board note that the RAC revenues "will not exceed the funds required to provide the replenishment program and shall be used exclusively for the replenishment program." (AR 33083, 33088.) Given the evidence showing that the RAC rates support the replenishment of groundwater and are not related to supplying water, under the reasoning in *Buenaventura*, Prop 218 does not apply to the RAC rates.[1]

Regardless, CVWD has not met its burden under Proposition 218. Proposition 218 provides that a "fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel." (Cal. Const., art. XIII D, § 6, subd. (b)(3).) It is CVWD's burden to show that the RAC rates do not exceed the proportional cost of groundwater replenishment attributable to the West AOB customers.

As is discussed in greater detail below, CVWD does not provide any evidence to establish that the RAC rates charged to West AOB customers are no more than necessary to cover the reasonable costs of groundwater replenishment for that AOB. CVWD only provides evidence to show that the West AOB RAC rates are higher than the East AOB RAC rates, and that such a disparity is logical given the greater costs imposed on the West AOB. However, no evidence is provided to show the RAC rates do not exceed the proportional cost of groundwater replenishment attributable to the West AOB customers. As such, even if Prop 218 does apply to the RAC rates, CVWD has not met its burden to show the rates are valid.

Proposition 26

Proposition 26 redefined the taxes that required voter approval under Proposition 218 to include "any levy, charge, or exaction of any kind imposed by a local government," except for specific exceptions. (Cal. Const., art. XIII C, §1, subd. (e).) Proposition 26 also requires a two-thirds vote of the Legislature to approve laws increasing taxes on any taxpayers and shifts the burden to the state or local government to demonstrate that any charge, levy or assessment is not a tax. (*Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310,

[1] In the recent writ for RIC1904943, the court found that Proposition 218 applied to Canal Water rates. Importantly, CVWD did not dispute that Prop 218 applied in that instance.

1322.) Proposition 26 shifted the burden of proof to the agency that imposed the levy, charge or fees: "The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of a governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." (Cal. Const., art. XIII C, § 1, subd. (e).) The Supreme Court of California has made clear that "the aggregate cost inquiry and the allocation inquiry are two separate steps in the analysis." (*Buenaventura, supra*, 3 Cal.5th at 1212.)

a. Aggregate Cost Inquiry

First, CVWD bears the burden of proving by a preponderance of the evidence that the RAC rates are no more than necessary to cover the reasonable costs of groundwater replenishment in the West AOB.

CVWD notes the West AOB was established nearly five decades ago following a geological survey and model by the Department of the Interior that determined the portion of the groundwater basin that would benefit from recharge at what became the Whitewater River GRF. (AR 11504[2].) The Whitewater River Subbasin is bounded by the following borders: to the north is the San Gorgonio Pass subbasin; to the northeast is the Garnet Hill fault, the Banning fault, and the San Andreas fault; on the west is the San Jacinto and Santa Rosa Mountains; and the south boundary is an imaginary line extending from Point Happy to the Little San Bernardino Mountains. (AR 11504.) When the federal government conducted this study in the 1970s, it noted "water levels have been declining" north of the imaginary line that constitutes the south boundary but rising south of the boundary. (AR 11504.) This indicates the West AOB was in greater need of groundwater replenishment at this time than the area that eventually became the East AOB was.

HJTA asserts that CVWD cannot credibly claim that the entire $11.4 million cost of the Palm Desert Groundwater Replenishment Facility (PD-GRF) is attributable to parcels in the West AOB because the record is clear the PD-GRF benefits parcels in the East AOB, as well. (AR:231:021752-759.) CVWD asked Todd Groundwater to perform a focused assessment of the groundwater model output files to quantify the impact of planned PD-GRF operations on subsurface flows across the boundary defining the West AOB and East AOB. (AR 021752.) The report notes the East AOB receives benefits from the PD-GRF. (AR 021755.) However, as CVWD points out, the report specifically states "[e]stimates of the effect of PD-GRF operations on subsurface flow across the AOB boundary using the local model are considered **unreliable**." (AR21756 (emphasis added).) CVWD provides evidence from the 2021-2022 Engineer's Report that the East AOB's groundwater elevation steadily declined from 1960 until 2009, when direct replenishment of the groundwater began at Thomas E. Levy Facility in the East AOB. (AR 26464.) These graphs also show that the West AOB's groundwater elevation, at least at one particular well close to the East AOB, was near zero until direct replenishment began at the PD-GRF

[2] Although this is the citation CVWD provides, this page of the record does not support this proposition. It does not discuss which portion of the groundwater basin would benefit from recharge; rather, it describes the boundaries of each subbasin.

in 2019. (AR 26464.) It is unclear from this information, though, if the PD-GRF had any impact on the East AOB.

CVWD asserts that the West AOB's RAC rates are higher because it is costlier and more expensive to maintain than the East AOB. In 2019, the West AOB used almost 7 times as much imported water as did the East (243,357 af vs. 36,143 af). (AR 26493, 26504.) In 2020, the West received almost 4 times as much imported water than the East (136,187 af v. 37,536 af). (Ibid.) Further, in 2020, the West RAC fund's supplemental water purchases totaled $13,346,000. (AR 33171.) In 2020, the East RAC fund's supplemental water purchases totaled only $3,967,000. (AR 26507.) CVWD argues this means the West RAC rates fund a lot more water purchases than the East RAC rates do.

CVWD does not provide any evidence, though, to establish that the RAC rates charged to West AOB customers are no more than necessary to cover the reasonable costs of groundwater replenishment for that AOB. CVWD seemingly attempts to improperly shift the burden to HJTA. ("HJTA cannot prove the East RAC and West RAC exceed the reasonable costs of service within each AOB." Opp. p.32:23-24.) CVWD does not provide any discussion about how the increased expenses unique to the West AOB result in the specific RAC rates those customers pay. All CVWD has done is shown that there is some evidence to support the West RAC rates being higher than the East RAC rates. This is not the burden CVWD must meet. Without providing specific evidence to show that the West RAC rates are no more than necessary to cover the West AOB's higher costs of groundwater replenishment, CVWD has not met its burden under the first prong of a Prop 26 inquiry.

b. Allocation Inquiry

CVWD bears the burden of proving by a preponderance of the evidence that the manner in which the RAC rates are allocated to West AOB users bears a fair or reasonable relationship to the payor's burdens on, or benefits received from, the replenishment activities.

HJTA argues that CVWD's Board has admitted the West AOB funds projects which are either mutually beneficial for both the East and West AOB, or that are unrelated to the West AOB entirely. (AR:51:001353, ln. 16-23.) CVWD Board member Patrick O'Dowd, while at a May 24, 2016 CVWD Board meeting, read from a 1974 Desert Sun newspaper article which said "the West RAC has morphed into something it was never intended to be...it has become a funding mechanism for the district to create projects which are arguably either mutually beneficial...or projects unrelated to the West RAC." Many of the CVWD Board members did not agree with O'Dowd's argument in this respect. This is not evidence that supports HJTA's argument.

CVWD asserts it must impose uniform assessments within an area of benefit, but not across various areas. (Water Code §31632.5.) Given the language of §31632.5[3], this is

[3] "Before July 1 of each year, the board may by resolution levy a replenishment assessment upon all water production during the following fiscal year within each area of benefit as determined by the board. The assessment within each area of benefit shall be at a uniform rate per acre-foot. The resolution shall also state the time or times at which such assessment shall be due and payable, which may be in convenient installments as determined by the board." Water Code §31632.5.

correct. However, the issue is whether the RAC rates charged to the West AOB bear a fair or reasonable relationship to the benefits/burdens the West AOB users receive from the replenishment activities. Conversely, the issue is also whether the RAC rates charged to the East AOB bear a fair or reasonable relationship to the benefits/burdens the East AOB users receive from the replenishment activities.

The West AOB began receiving groundwater replenishment from the Whitewater GRF in 1973 (AR 7792). This led, at least initially, to an increase in the West AOB's groundwater levels. The East AOB's levels were stable until the mid-1980s, when they began to steadily decline. CVWD argues that if the East AOB benefitted from the Whitewater GRF, its levels would have started to rise in 1973, just as the West's did. CVWD notes that the East AOB's levels only increased after CVWD began operating the Levy GRF in 2009. (AR 7792.) Thus, CVWD concludes that the East AOB does not benefit from the Whitewater GRF. The graphs in the Engineer's Report certainly show the levels and trends that CVWD references. However, it is not clear from the graph alone that CVWD's interpretation of the cause and effect of the rising/declining levels is accurate. These graphs provide data and not interpretation.

The discussion in the April 2020 Engineer's Report notes that as a result of conservation efforts and "in-lieu replenishment programs where Colorado River water and recycled water are used to reduce demands on groundwater," the East AOB saw increased groundwater levels. Level increases in the direct vicinity of the Levy GRF were "primarily the result of annual direct replenishment" from the Levy GRF. (AR 7835.) This discussion supports the data detailed above that the East AOB benefitted directly from the Levy GRF. Though, it still does not answer the relevant question of whether the East received any benefit from the West AOB's replenishment efforts.

In Reply, HJTA provides evidence that shows replenishment in the West AOB benefits the East AOB due to the flow of groundwater from West to East. (See Reply Brief pages 5-6, citing AR:80:1779; 80:1856; 80:1844; 80:1873; Reply RJN Ex. 1 at p.47; AR:22:796 ("The recharge programs in the Upper Valley directly and indirectly benefit the entire Valley by reducing the amount of overdraft"); etc.) Once again, HJTA does not bear the instant burden. The evidence provided by HJTA showing the East AOB benefits from the West AOB's replenishment efforts further calls into question CVWD's lack of evidence to meet its burden. CVWD has not provided evidence to show that only the West AOB benefits from the higher costs associated with replenishing that area's groundwater. Thus, it has not shown that the manner in which the RAC rates are allocated bears a fair or reasonable relationship to the burdens and benefits to the West and East AOB customers.

CVWD has not met its burden as to either prong of a Proposition 26 analysis. Accordingly, CVWD has not shown that the RAC rates comply with Proposition 26.

Abuse of Discretion/Public Policy

As this is a traditional, section 1085 writ, relief is only available if the duty is clear and ministerial. The pronouncement of a general policy in §106 does not seem to prohibit discretion in public entities to such a degree that its decisions would necessarily be ministerial. Petitioner doesn't provide any authority that supports §106 being used as a basis to grant the requested relief.

S. SYKES, Judge.
L. Howell (vis), Clerk

Due Process Clause

Under the California Constitution, a person may not be deprived of life, liberty, or property without due process or law. (Cal. Const. Art. I, § 7.) "A government entity may be found liable for a due process violation for conduct that deliberately flouts the law, but such conduct still must "obstruct the [plaintiff's] constitutionally based *property rights*." (*Bottini v. City of San Diego* (2018) 27 Cal.App.5th 281, 316 (emphasis in original).) HJTA has not provided any authority that identifies rates paid by domestic water users to a regional water district as property. This argument is unavailing and is not a basis on which to grant the writ petition.

Equal Protection Clause

There is a two-step analysis to determine whether a challenged classification is rationally related to achieving a legitimate state purpose. First, "it must be determined whether the challenged legislation has a legitimate purpose." If it does, then the court must decide whether "it was reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose." (*Hoffman v. U.S.* (9th Cir. 1985) 767 F.2d 1431, 1436 (*citing Western & Southern Life Ins. Co. v. State Bd. of Equalization* (1981) 451 US 648, 668).)

CVWD has provided evidence that the costs associated with replenishment in the West AOB are greater than those in the East AOB. This is not necessarily disputed by HJTA. CVWD has divided its customers into geographical areas of benefit and then charged rates allegedly based on those areas of benefit. The issues with cost allocation are discussed above, but for purposes of an equal protection analysis, CVWD has established that dividing customers into different AOBs and charging those customers different rates is not inherently a violation of any law. HJTA has not provided any evidence to the contrary with respect to an equal protection challenge. This is not a basis on which to grant the instant petition.

Relief

Plaintiff requests a further evidentiary hearing to establish the exact amount of monetary relief it is entitled to. As such the court intends to set such a hearing in consultation with counsel. Counsel shall meet and confer and propose a briefing and hearing schedule.

With respect to injunctive relief, more information is needed from the parties, and the court declines to order such. Such injunctive relief can be addressed in conjunction with the monetary relief briefing and hearing.

Date: 4/21/22

Sunshine S. Sykes
Judge of the Superior Court
County of Riverside

S. SYKES, Judge.
L. Howell (vis), Clerk
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SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE

Historic Court House
4050 Main Street, Riverside, CA 92501

Case Number: RIC1905897

Case Name: ROBERTS VS COACHELLA VALLEY WATER

~~COACHELLA VALLEY WATER DISTRICT~~

CERTIFICATE OF MAILING

I certify that I am currently employed by the Superior Court of California, County of Riverside, and that I am not a party to this action or proceeding. In my capacity, I am familiar with the practices and procedures used in connection with the mailing of correspondence. Such correspondence is deposited in the outgoing mail of the Superior Court. Outgoing mail is delivered to and mailed by the United States Postal Service, postage prepaid, the same day in the ordinary course of business. I certify that I served a copy of the foregoing notice on this date, by depositing said copy as stated above.

Notices Mailed: RULING

Dated: 04/21/2022

W. SAMUEL HAMRICK JR.,
Court Executive Officer/Clerk of Court

by: _____
L. Howell, Deputy Clerk

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