NO. B297553

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

FOOD AND WATER WATCH
and CENTER FOR FOOD SAFETY,
Appellants,

v.

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, et al.
Respondents.

On Appeal from the Superior Court of Los Angeles
The Hon. Randolph M. Hammock, Presiding (Case No. BC720692)

APPELLANTS' OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL SECOND APPELLATE DISTRICT, DIVISION	COURT OF APPEAL CASE NUMBER: B297553
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 191157 NAME: Adam Keats FIRM NAME: Law Office of Adam Keats STREET ADDRESS: 303 Sacramento St., 2nd Fl. CITY: San Francisco STATE: CA ZIP CODE: 94111 TELEPHONE NO.: 415-430-9403 FAX NO.: E-MAIL ADDRESS: adam@keatslaw.org ATTORNEY FOR (*name*): Food & Water Watch and Center for Food Safety	SUPERIOR COURT CASE NUMBER: BC720692
APPELLANT/ PETITIONER: Food & Water Watch and Center for Food Safety RESPONDENT/ REAL PARTY IN INTEREST: Metropolitan Water District of Southern California	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party (*name*): Food & Water Watch and Center for Food Safety

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Date: January 7, 2020

Adam Keats
(TYPE OR PRINT NAME)

▶ Adam Keats
(SIGNATURE OF APPELLANT OR ATTORNEY)

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INTRODUCTION

Appellants Food & Water Watch and Center for Food Safety, which seek the reversal of a decision sustaining Defendants' demurrers brought the underlying reverse-validation action to challenge Defendant Metropolitan Water District of Southern California's (MWD) resolutions authorizing binding debt of over $10 billion in the form of revenue bonds. The bonds are secured by revenues to be raised through future water rate increases and/or future property tax increases. Appellants allege that MWD's debt authorization—which lacks any specific ceiling on MWD's debt obligation, or any secure off-ramp at later procedural stages—is invalid and unlawful. Before incurring this risky obligation, MWD failed to first secure the approval of district voters, required by Propositions 13 and 26 (for the rate and/or tax increases on which the bonds depend) and required by MWD's own Metropolitan Water District Act (for the bonded indebtedness authorized by the operative bond resolutions).

MWD and answering party San Diego County Water Authority (SDCWA) filed demurrers, arguing, among other things, that Appellants' action is premature because MWD has not yet specifically

imposed the planned tax and/or rate increases to cover the obligations referenced in its resolutions. This argument rests on a line of cases holding that taxpayer actions under Propositions 13 and 26 may only be brought after the imposition—i.e., enactment—of the relevant taxes or rates. (*See Reid v. City of San Diego* (2018) 24 Cal.App.5th 343, 368-369; *Citizens for Fair REU Rates v. City of Redding* (2018) 6 Cal.5th 1, 15-19.)

Appellants countered that this is a challenge to an agency's authorization of bond indebtedness, not a taxpayer challenge to imposed taxes or rates. Under validation law, authorization rather than imposition is paramount. Much like direct agency actions seeking validation, any challenge to an agency's authorization of indebtedness through a reverse-validation action must be brought within 60 days, even if that is before the debt is actually incurred or bonds are issued. (Code Civ. Proc. § 863; *see Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 842; *Planning & Conservation League v. Dep't of Water Res.* (1998) 17 Cal.4th 264, 271-272.) Moreover, far from being speculative, MWD's duties relating to taxation and bond debt are expressly identified in Water Code section 11652 and under MWD's State Water Project (SWP)

contract. (Appellants' Appendix (AA) 019-020.) Applying fundamental principles of contract law, MWD's authorization is invalid because MWD does not have the authority or ability to repay the debt obligation authorized therein, having not secured the approval of its voters for the required rate and/or tax increases.

MWD's authorization is also invalid because it plainly violates Propositions 13 and 26, by authorizing debt dependent on planned rate and/or tax increases without securing voter approval. Previous caselaw addressing challenges under Propositions 13 and 26 have focused on direct taxpayer challenges, leading to a line of cases that has found ripeness only if a tax or rate increase has actually been *imposed*. This reasoning, whatever its merits in that distinct setting, is fundamentally different from and cannot be read to curtail validation challenges, which are tied to a time-limited opportunity following an agency's *authorization* of an action, not its imposition of the action.

The relationship between validation law and Propositions 13 and 26 has not yet been clearly resolved in published authorities. Recognizing the complexity of the matter presented, the trial court recognized that denying judicial review could place Appellants "between a rock and a hard place," left without a secure opportunity

for subsequent challenge. (March 15, 2019, Transcript, at pp. 22, 36.) Nonetheless, the trial court concluded that Appellants' action was not ripe because taxes or rates had not yet been raised.[1] The court invited appellate review, stating during argument: "[w]e need guidance. I need guidance on this because it presented very complicated issues that I struggled with, but I think I just came down to its most simplest point, you know. I probably latched onto the easiest issue and punted. Okay. That's what I did." (March 15, 2019, Transcript at p. 36.)

The primary question raised by this appeal is thus: Is an agency's authorization of bond indebtedness, to be repaid by future rate and/or tax increases, subject to challenge under validation law on the basis that the agency failed to first secure required voter approval for those rate or tax increases? This question has great statewide policy implications. The answer must be yes, otherwise any agency

[1] The trial court did not address the other grounds raised by MWD in support of its demurrer to the first, second, and third causes of action: that Appellants unreasonably interpreted the Resolutions to authorize bonds that depend on future rate or tax increases and that Appellants lack standing. The trial court granted MWD's demurrer to the fourth cause of action on the grounds that it was not pled with sufficient specificity, but made clear during argument that it regarded the claim to be related to the other claims ("bootstrapped") and thus possessing the same ripeness issues as the other claims. (See March 15, 2019, Transcript at pp. 26-27.)

could avoid a vote on rate or tax increases merely by first authorizing bonded indebtedness. Such a loophole would completely eviscerate Propositions 13 and 26. For those Constitutional provisions to have any future meaning, such an authorization must be subject to invalidation.

FACTUAL AND PROCEDURAL BACKGROUND

The relevant facts are not in dispute. On July 10, 2018, MWD adopted Resolutions 9243 and 9244. (See AA014-015 [FAC ¶¶ 19-21]; AA028-036 [Resolutions].) The resolutions authorize MWD to form a Joint Powers Authority that will issue revenue bonds to fund up to 64.6% of the estimated costs for the California WaterFix project. (*Id.*) MWD estimated the indebtedness referenced in the resolutions at $10.8 billion, but actual costs may be significantly in excess of that figure (AA015 [FAC, ¶ 22]), and MWD's resolutions lack any specific ceiling on its debt obligation. (AA009 [FAC, ¶ 9].) The resolutions further authorize MWD to secure its payment obligations for these bonds with a lien on its future water revenues. (*Id*.) MWD plans to recover "some portion of its costs by increasing future wholesale water rates paid by its member agencies," but MWD is contractually obligated to raise property taxes if it cannot raise sufficient funds

though water rate increases. (MWD MPA's in Support of Demurrer at p. 10; AA015 [FAC ¶ 23].) MWD has not yet raised water rates or property taxes to pay these payment obligations. (AA080.)

Appellants filed their reverse-validation complaint in validation on September 7, 2018, and filed the operative First Amended Complaint (FAC) on January 10, 2019. The FAC includes four causes of action. The First Cause of Action seeks a determination of invalidity for MWD's authorization of bonds and indebtedness dependent on water rate increases that lack voter approval. (AA020-021.) The Second Cause of Action seeks a determination of invalidity for MWD's authorization of bonds and indebtedness dependent on property tax increases that lack voter approval. (AA021-023.) The Third Cause of Action seeks a determination of invalidity for MWD's violation of its long-term contract with the Department of Water Resources for the operation of the State Water Project. (AA023-024.) The Fourth Cause of Action seeks a determination of invalidity for violations of various other provisions. (AA024.) SDCWA filed a demurrer to Appellants' First Cause of Action on February 14, 2019, and MWD filed a demurrer to all four causes of action on February

15, 2019. A hearing was held on March 15, 2019, and the Court's order and judgment were entered on April 9, 2019.

The Court sustained both demurrers as to the First Cause of Action on the basis that Appellants "did not plead facts giving rise to a violation of Proposition 26 because there has been no actual imposition of a 'tax,' but only the establishment of a framework for future rate raises and taxes." (AA285, AA287.) The court sustained MWD's demurrer to the Second Cause of Action on similar grounds, stating that the FAC "does not plead that any property tax increase has yet been effectuated in conjunction with the WaterFix Authorization. Indeed, Plaintiffs have not, and cannot, specify the rate of any increase above that permitted by Proposition 13 because any such increase is, at the moment, hypothetical and speculative." (AA288.) The Court sustained MWD's demurrer to the Third Cause of Action for the same reasons (AA289), and sustained MWD's demurrer to the Fourth Cause of Action on the grounds that Appellants failed to plead the violation with sufficient specificity. (AA290.) The court did not reach the merits of the other arguments raised by MWD. The demurrers were both sustained without leave to amend.

This appeal was timely filed on May 8, 2019. Appellants now seek reversal of the trial court's decision granting the demurrers.

QUESTION PRESENTED

Is an agency's advance authorization of over $10 billion in revenue bond debt, to be repaid by future rate and/or property tax increases, ripe for challenge in a reverse-validation action on the basis that the agency failed to first secure required voter approval for those rate or tax increases?

STANDARD OF REVIEW

The standard of review for a trial court's sustaining a demurrer is well-settled. The appellate court "determines whether the complaint states facts sufficient to constitute a cause of action." (*Friedland*, *supra*, 62 Cal.App.4th at p. 842.) The allegations in the complaint are treated as true and construed liberally "with a view to attaining substantial justice." (*Id*.) The appellate court's review is de novo. (*California Commerce Casino v. Schwarzenegger* (2007) 146 Cal.App.4th 1406, 1419.)

ARGUMENT

I. The Resolutions Are Subject to Validation

A. The Resolutions Authorize MWD's Indebtedness

Resolution 9243 and 9244 constitute authorizations of indebtedness by MWD that are subject to validation. The Resolutions explicitly: (1) authorize MWD to create the Joint Powers Authority; (2) authorize the JPA to purchase the "Unsubscribed Capacity Interest" in the WaterFix project; (3) authorize the JPA to issue bonds to pay for that purchase; (4) authorize the repayment of those bonds by MWD; and (5) authorize MWD to secure the bonds with its own future water revenues. (AA028-029 [Resolution 9243, Finding 3].) Similarly, with Resolution 9244, MWD authorized its general manager to form a "Financing JPA" that may issue "bonds of its own" to be secured in part by MWD's water revenues. (AA034 ["The Board further authorizes the General Manager to secure [MWD's] obligations … with a lien on its water revenues on such terms and conditions as the General Manager shall determine in his or her discretion."].)

MWD argued in its demurrer that the "Resolutions do not authorize the issuance of any bond. To the contrary, they expressly anticipate that a new and not-yet-formed joint-powers authority will issue bonds at some time in the future." (AA088; see also AA081.) This argument ignores the indebtedness that MWD clearly and plainly

authorizes in its Resolutions: "[MWD] would make installment payments that would support the payment of the JPA Bonds; and …[MWD] would secure its obligations to make installment payments with a lien on its water revenues." (AA028-029 [Resolution 9243, Finding sections 3.(c) and (d)].) Whether the bonds are issued by MWD or a JPA is irrelevant for the purposes of a validation challenge; what matters is that MWD has authorized its indebtedness with the Resolutions.[2] (Government Code § 53511.)

Caselaw is clear that reverse-validation challenges must be brought within 60 days of an agency's authorization of indebtedness, whether or not the debt is in fact incurred. In *California Commerce Casino*, the plaintiffs challenged the constitutionality of enacted legislation that ratified tribal-state gaming compacts and authorized the issuance of bonds that were secured by tribal-state gaming compacts. (*California Commerce Casino*, *supra*, 146 Cal.App.4th at p. 1413.) The Second District ruled that the plaintiffs should have brought their challenge as a validation action, within the validation

[2] The trial court, for its part, was not convinced by MWD's argument, stating "I'm not buying their argument that since they're not issuing the bonds they can't be held responsible." (March 15, 2019, Transcript at p. 11.) Although the court said that "I don't need to make that finding," it added that the argument "did not resonate with me." (*Id*.)

statutes' statute of limitations, even though the bonds had not yet been issued and the debt had not yet been incurred. (*Id*. at pp. 1430-31.) The court explained that "the application of the validation statutes is not contingent on whether the bonds are ultimately issued at the end of the process. The applicability of the validation statutes is determined at the beginning of the financing process when the contracts—in this case the amended compacts—required to implement that process are approved." (*Id*. at p. 1431.)

Here, MWD initiated the financing process by approving Resolutions 9243 and 9244, authorizing its own indebtedness in the form of bonds secured by MWD's future revenues. MWD's authorization of its indebtedness fits squarely within the plain language of the validation statutes and thus is subject to a reverse-validation challenge.

B. Appellants' Reverse-Validation Challenge Was Timely

The time limit to bring a validation action is 60 days from an agency's authorization of indebtedness. (Code Civ. Proc. §§ 860, 863.) If no validation action is brought by the agency, the authorization "will 'become immune from attack if no interested person brings a proceeding to establish the act's validity or invalidity

within 60 days.'" (*Reid v. City of San Diego* (2018) 24 Cal.App.5th 343, 371 [quoting *Kaatz v. City of Seaside* (2006) 143 Cal.App.4th 13, 30].) "As to matters 'which have been or which could have been adjudicated in a validation action, such matters—including constitutional challenges—must be raised within the statutory limitations period in section 860 *et seq*. or they are waived." (*Friedland*, *supra*, 62 Cal.App.4th at pp. 846-847.)

A validation action performs an important and critical function in the operation of government: it "limit[s] the extent to which delay due to litigation may impair a public agency's ability to operate financially." (*Id*. at p. 843.) A validation action also "facilitate[s] a public agency's financial transactions with third parties by quickly affirming their legality." (*Ibid*.) Investors are highly unlikely to purchase public agency bonds that may be subject to a future legal challenge, and thus establishing legal certainty for those bonds is paramount. (*Id.* at p. 842 ["The fact that litigation may be pending or forthcoming drastically affects the marketability of public bonds" (quotation marks and citation omitted)]; *State of California ex rel. Pension Obligation Bond Committee v. All Persons Interested in the Matter of the Validity of the California Pension Obligation Bonds to*

be Issued (2007) 152 Cal.App.4th 1386, 1397 ["Within their proper scope, such validation actions serve an important function in eliminating legal uncertainty that could impair a public agency's ability to operate, market bonds, or the like."].)

The need for legal certainty for an agency's bond offerings dictates that any challenge to the validity of a bond authorization be resolved "at the beginning of the financing process," *before the bonds are sold*. (*California Commerce Casino*, *supra*, 146 Cal.App.4th at p. 1431.) For this reason, the validation statutes provide detailed guidance as to when decisions regarding the issuance of bonds may be challenged in validation: "[b]onds and warrants shall be deemed authorized as of the date of adoption by the governing body of the public agency of a resolution or ordinance authorizing their issuance…" (Code Civ. Proc. § 864.)

As described above, the Resolutions approved by MWD authorize indebtedness by MWD in the form of bonds to be secured by future MWD revenues. A challenge to the validity of the Resolutions must have been brought within 60 days of their authorization, or no such challenge could ever be brought. Appellants brought their reverse-validation action within 60 days of MWD's

adoption of the Resolutions and thus their challenge is timely. (Code Civ. Proc. § 863.)

II. The Resolutions Are Invalid Because They Authorize Debt Secured by Future Revenues Without Obtaining Required Voter Approval

The Resolutions are invalid because they authorize MWD to incur a virtual blank check in multi-billion-dollar debt that it has no lawful ability to repay. The debt will be incurred in the form of bonds sold to investors, secured by future revenue (either increases to water rates or increases to property taxes) that has not been approved by voters, as is required by Propositions 26 and 13. Without having first secured voter approval for either its planned rate increases or possible property tax increases, MWD cannot commit to repayment of the bonds authorized by the Resolutions. Thus, the Resolutions' provisions securing MWD's debt with a lien on MWD's future revenues is founded on risky speculation that these debts can be feasibly and lawfully repaid. That commitment, unenforceable and impossible at the time MWD authorized the Resolutions, cannot be lawfully validated.

A. MWD's Planned Water Rate Increases Require Voter Approval

Resolution 9243 authorizes MWD to purchase up to 64.6% of the "capacity interest" of the California WaterFix project, at an estimated cost of $10.8 billion. (AA010 [FAC, ¶ 4], AA014 [FAC, ¶ 20], AA015 [FAC, ¶ 22]; AA 0128-029 [Resolution 9243, ¶ 3].) But MWD's projected needs and use of the project are far less than 64.6% of its total capacity. (AA016 [FAC, ¶ 30].) The Resolutions authorize this purchase of excess capacity commitment because funding commitments from other water districts and agencies had "failed to materialize." (AA013 [FAC, ¶ 17].) MWD hopes to recoup some of its spending on WaterFix by selling some or all of the extra capacity to other water districts and agencies, but so far there are no commitments or contracts for any such deals. (AA016 [FAC, ¶¶ 27-28].)

The funds required for MWD's purchase of 64.6% of the capacity interest in WaterFix are to be raised through the issuance of revenue bonds, to be repaid over time by future revenues obtained from MWD's customers. (AA015 [FAC, ¶ 23].) MWD estimates its annual costs to service this debt at $515 million per year, which is an increase of 33% of its current budget. (AA016 [FAC, ¶ 24].) It plans

on recovering these increased costs by raising its wholesale water rates. (*Id*.) As wholesale water rates directly correlate to retail water rates, MWD projects that residential ratepayers will pay at least $4.80 per month more in their water bills. (AA016 [FAC, ¶ 24-25].) Other estimates predict much higher increases in rates, possibly double or triple that figure. (AA016 [FAC, ¶ 26].)

Proposition 26, enacted by California voters in 2010, expanded the definition of tax as used in the language of Proposition 13 to include "any levy, charge, or exaction of any kind imposed by a local government." (Cal. Constitution Art. XIII C.) Local governments are prohibited from imposing, extending, or increasing any such tax unless and until the tax is approved by the electorate by a two-thirds margin. (*Id*.) Some governmental charges are exempted from Proposition 26's restrictions, including charges for governmental services which do not exceed the reasonable costs to the local government of providing the services. (*Id*.) The water rate increases relied on in the Resolutions to repay MWD's debt obligations cannot, under any circumstance, satisfy any exemption under Proposition 26. (See AA019 [FAC, ¶ 43], see AA020-021 [FAC, ¶¶ 52-59].)

Proposition 26 thus requires that a vote be held for any rate increases to be used to repay MWD's WaterFix debt.

B. Any Tax Increase to Pay MWD's WaterFix Debt Requires Voter Approval

Although MWD plans on repaying its debt with increased water rates, it is contractually and statutorily obligated to raise property taxes if it cannot raise sufficient funds through rate increases. (AA015 [FAC, ¶ 23]; AA019 [FAC, ¶¶ 44-48].) Property taxes are governed by Article XIII A of California's Constitution, enacted by voters in 1978 with Proposition 13. (Cal. Constitution, Art. XIII A.) Proposition 13 allows for property taxes to exceed 1% of assessed value only with the approval of two-thirds of a district's voters. Without approval of the electorate, property taxes may exceed 1% of assessed value only in certain circumstances, including for indebtedness approved by voters prior to July 1, 1978. (*Id.*)

California voters ratified the Burns-Porter Act in 1960. The broad purpose of the Burns-Porter Act was to enable the construction of the State Water Project. Although many State Water Project contractors have relied on the voter approval of the Burns-Porter Act to argue that their proposed tax increase qualifies for the exception in

Proposition 13 for pre-1978 debt, MWD's WaterFix debt does not qualify. (AA018 [FAC, ¶ 39], AA022-023 [FAC, ¶¶ 64-70].) Therefore, any property tax raised to pay MWD's debt authorized by the Resolutions must be approved by voters.

C. MWD's Authorization of Bonded Indebtedness Requires Voter Approval

The Metropolitan Water District Act, under the chapter titled "Bonds Requiring the Approval of Voters," requires MWD to seek voter approval for bonded indebtedness used for "the payment of funds for any part of the capital costs of any public improvement or works of this state from which service is to be provided to the district … the cost of which will be too great to be paid out of the ordinary annual income and revenue of the district." (Water Code Appendix Section 109, § 200.) The authorizations make clear that MWD will not be able to pay its bond debt through its existing and ordinary annual income and revenue, and that rate increases are anticipated. (AA016 [FAC, ¶¶ 27-28].) Pursuant to its own District Act, then, MWD was required to seek voter approval before authorizing its bonded indebtedness. The trial court recognized that declining to adjudicate Appellants' District Act claim could place them "between a

rock and a hard place," yet ultimately did just that. (March 15, 2019, Transcript at p. 35.)

D. This is a Reverse-Validation Action, Not a Taxpayer Action

MWD and SDCWA argued in their demurrers, and the trial court agreed, that any rate or tax increases associated with the Resolutions could only be challenged after those rates or taxes are actually assessed or imposed. (AA086-089; AA050-053; AA285.) It is true that rate or tax increases need to be actually assessed before they may be challenged under Propositions 13 or 26 through a direct taxpayer challenge. But this not a Proposition 13 or 26 taxpayer challenge to any rate or tax increase. This is a validation challenge to an agency's decision to take on billions of dollars in debt lacking any specific ceiling, despite its lack of lawful authority or ability to ensure repayment.

The trial court relied primarily on *Reid v. City of San Diego* and *Citizens for Fair REU Rates v. City of Redding* in concluding that the FAC "does not plead facts giving rise to a violation of Proposition 26 because there has been no actual imposition of a 'tax,' but only the establishment of a framework for future rate raises and taxes."

(AA285; *Reid v. City of San Diego* (2018) 24 Cal.App.5th 343; *Citizens for Fair REU Rates v. City of Redding* (2018) 6 Cal.5th 1.) Neither *Reid* nor *City of Redding* were validation actions; they were both direct taxpayer challenges focused exclusively on imposition, not authorization.

In *City of Redding*, the plaintiffs brought a taxpayer challenge alleging that the city failed to secure required voter approval for rate increases by the city-owned electrical utility. (*City of Redding*, *supra*, 6 Cal.5th at p. 4.) The court ruled that "[t]he undisputed evidence here shows that the challenged rates did not exceed the reasonable costs of providing electric service. Because the challenged rates were not taxes, voter approval was not required." (*Ibid*.) Nowhere in the opinion did the court discuss, much less cite, the validation statutes. Nonetheless, MWD cited *City of Redding* for the notion that "an agency's decision to incur an otherwise allegedly unsupported cost is not a tax subject to constitutional challenge." (AA087.) Again, this is not a constitutional challenge to an assessed rate or tax increase, it is a reverse-validation action to an agency's authorization of indebtedness.

Reid also regarded a taxpayer challenge, not a validation action: "the gravamen of Plaintiffs' claim is that the 2012 renewal assessment

is a disguised tax that violates Proposition 26 because it was never submitted to the electorate for a vote." (*Reid*, *supra*, 24 Cal.App.5th at p. 352-53.) Although the court discussed the validation statutes, it did so in the context of the defendant's motion for sanctions, not on the merits. While it summarized validation procedure and discussed whether a municipal ordinance triggered validation law or not, the court concluded that "a reasonable argument can be made that Plaintiffs' action is not subject to validation procedures and, therefore, their appellate arguments challenging the order sustaining the demurrer on that ground are not frivolous." (*Id.* at p. 373.) Although the trial court in *Reid* had ruled against the plaintiffs on the ground that three of their causes of action were barred by the 60-day statute of limitations contained in section 860, the Court of Appeal did not adopt that position, instead ruling that the particular causes of action were barred by the municipal ordinance's 30-day statute of limitations. (*Id*. at pp. 355-56.)

Here, the trial court quoted two passages from *Reid*. The first passage is from the general discussion of validation procedures. (AA283-284, quoting *Reid*, *supra*, 24 Cal.App.5th at p. 371.) The second passage quoted has nothing to do with validation law; it

regards a claim that was clearly brought as a direct taxpayer action under Proposition 26. (*Reid*, *supra*, 24 Cal.App.5th at pp. 367-68; see AA285-287.) The trial court made it clear during argument that it was basing its ruling mostly, if not completely, on this portion of *Reid*: "It does seem like I think you are between a rock and a hard place at this point. But again, I'm just relying upon *Reid* and what I felt it was saying in terms of the facts in its simplest form, since a tax has not been yet imposed." (March 15, 2019, Transcript at p. 34.)

SDCWA's entire demurrer is premised on the argument that Appellants brought a taxpayer challenge under Proposition 26. (See AA049 ["before the Court can entertain Plaintiffs' claim for violation of Proposition 26..."]; AA050 ["Plaintiffs cannot state a claim for violation of Proposition 26…"]; AA053 ["Plaintiffs have not alleged and cannot allege facts sufficient to constitute a claim for violation of Proposition 26…"].) Just like MWD's demurrer, SDCWA argues against a straw-man; this is a reverse-validation action, not a Proposition 26 challenge.

Nowhere in *City of Redding* or *Reid* is there any guidance, let alone controlling authority, as to the question raised in this appeal: can a reverse validation action be brought against an agency's

authorization of debt that will be paid back by planned rate and/or tax revenues that lack required voter approval? In contrast, the law is well settled that validation actions must be brought within 60 days of an agency's *authorization* of the debt—regardless of when, or even if, the bonds have actually been issued. (*See Friedland v. City of Long Beach*, *supra*, 62 Cal.App.4th at 842; *Planning & Conservation League v. Dep't of Water Res.*, *supra*, 17 Cal.4th at 271-272; *California Commerce Casino*, *supra*, 146 Cal.App.4th at p. 1431.) The question is not whether MWD properly assessed a tax or fee; it is whether MWD properly authorized its indebtedness. That question must be answered based upon the agency's authorization, before the bonds are issued, before the bonds are purchased in the marketplace, and before the debt is incurred.

E. MWD Cannot Incur the Debt Authorized by the Resolutions Without First Obtaining Voter Approval

There should be no question that a decision by MWD to raise water rates or property taxes to pay for 64.6% of the capacity of WaterFix would require a vote by MWD's electorate. (See AA016 [FAC, ¶¶ 27-31], AA020-021 [FAC, ¶¶ 52-56], AA022-023 [FAC, ¶¶ 63-70].) The Resolutions authorize MWD to "finance and purchase"

the "unclaimed" capacity of the WaterFix project, in addition to what MWD had already committed to purchasing for its own use, for a total of 64.6% of the WaterFix project. (AA028-029 [Resolution 9243 at pp. 1-2].) MWD's costs were conservatively estimated at $10.8 billion (with annual payments of over $515 million, or 33% of the agency's total annual budget), but lacked any specific ceiling. (AA010 [FAC, ¶ 4], AA015 [FAC, ¶ 22].)

These costs include expenditures that are unreasonable and unfair to MWD's ratepayers, as they are disproportionate to any possible benefits conferred on the ratepayers. But by approving these costs in the form of bonds, MWD sought to separate the expenditures from their associated (and planned and necessary) rate or tax increases, in order to avoid a vote under either Proposition 13 or 26.

In its demurrer, MWD argued that any "assumption of bonded indebtedness would be a *cost obligation* and would not constitute a tax or rate that could support a cause of action" under Propositions 13 or 26. (AA088, emphasis added, citing *City of Redding*, *supra*, 6 Cal.5th at pp. 4-5, 15-19.) The "budgeted cost obligations" that were at issue in *City of Redding*, *supra*, were found by the Supreme Court to not be taxes subject to a taxpayer challenge under Proposition 26.

(*City of Redding*, *supra*, at pp. 4-5, 12.) Thus, in MWD's conception, the debt installment payments authorized by the Resolutions would be a cost "imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product," and thus would not be a "tax" under Proposition 26. (Art. XIII C, § 1, subd. (e)(2); *City of Redding*, *supra*, 6 Cal.5th at p. 11.)

Any effort by MWD to raise its water rates for the purpose of directly funding the WaterFix project up to $10.8 billion would clearly require a vote of its electorate under Proposition 26. Yet, to MWD, if it commits to funding WaterFix through the issuance of bonds, leaving its obligation to pay off those bonds to a future action to raise water rates, a vote would not be required because the rates would be raised to pay off a budgeted cost obligation—not to fund the WaterFix project. For the purposes of Proposition 26 there is no functional difference between these two actions. Both are approvals for rate

increases needed to pay for WaterFix and both should require votes by the electorate.[3]

MWD's funding scheme seeks to similarly immunize MWD from its obligations under Proposition 13 for possible property tax increases associated with WaterFix. MWD's long-term contract with the Department of Water Resources for management of the State Water Project provides that "[i]f in any year the District fails or is unable to raise sufficient funds" to pay its SWP cost obligations, MWD is required to levy property taxes to raise funds for those payments. (AA019 [FAC, ¶ 45].) Similar language is found in Water Code § 11652. (Water Code § 11652; AA019 [FAC, ¶ 46].) Because an agency's debt approved before July 1, 1978, is not subject to Proposition 13, some SWP contractors have, after the passage of Proposition 13, raised property taxes for their SWP expenses without obtaining voter approval. (AA018 [FAC, ¶¶ 37-39].) By approving

[3] To the extent that MWD's first basis for demurring is that it was not liable for the issuance of the bonds because the bonds will be issued by "a yet-to-be-formed joint-powers authority that *itself* is expected to issue bonds under its own authority," (AA081-082 (emphasis added); see also AA088), this argument should be rejected, as the authorization of *indebtedness* is actionable in validation, not just the authorization of the issuance of bonds. (Government Code § 53511.) For its part, the trial court was not convinced by the argument. (See March 15, 2019, Transcript at p. 11.)

its WaterFix-related expenses now, in the forms of bonds, MWD may claim later that its pre-1978 SWP contract with DWR obligates it to raise property taxes in order to pay this "budgeted cost obligation," with no vote being required under Proposition 13. (See Article XIII A.)

It is not beyond conception that a public agency would create a funding scheme involving a joint powers authority with the intent to circumvent the requirements of Propositions 13 and 26. In *Rider v. County of San Diego*, the Supreme Court found that a special agency created by the Legislature for the purposes of financing the construction of a justice facility was "created to raise funds for county purposes and thereby circumvent Proposition 13…." (*Rider v. County of San Diego* (1991) 1 Cal.4th 1, 11.) Here, MWD's efforts to create a budgeted cost obligation in the form of debt to be repaid to a JPA that will issue bonds secured by MWD's future revenues is a similar effort to circumvent the restrictions placed on the agency by Propositions 13 and 26.

The trial court admitted that a ruling sustaining the demurrers would put Appellants "between a rock and a hard place. They can't challenge it when you make a resolution because it's not already been

imposed, but once they do it there's no challenge available. So you got them either coming or going. That doesn't make sense to me." (March 15, 2019, Transcript at pp. 21.) The court recognized the consequences of dismissing Appellants' validation challenge: if upheld, MWD's authorization of $10.8 billion of debt will become "immune from attack." (See *Reid*, *supra*, 24 Cal.App.5th at p. 371; Code of Civ. Proc. §§ 860, 863.) No further action or decision by MWD will be required for the bonds to be issued, the debt to be incurred by MWD, and for MWD to become liable for full repayment of the bonds. (AA029 ["the District would make installment payments that would support the payment of the JPA Bonds; and … The District would secure its obligations to make installment payments with a lien on its water revenues."].)

SDCWA responded to the trial court's concern by stating that it believed that SDCWA, at least, would have an action under Proposition 26 if and when MWD "impose[s] water rates that are disproportionately unfavorable to San Diego County Water Authority customers." (March 15, 2019, Transcript at p. 23.) Left unsaid was what good a challenge to increased taxes or rates would be after $10.8 billion of bonds have already been issued, and SDCWA did not

address MWD's argument about the debt being a "budgeted cost obligation" that would not require a vote under Proposition 26, nor did it address the concern that MWD's SWP contract could also be used to avoid a vote of the electorate.

The fact is that the Resolutions authorize MWD to incur an estimated but uncapped $10.8 billion in debt for the purpose of building the WaterFix project and that this debt is secured by MWD's future revenues. MWD will almost certainly argue that these revenues can be raised through rate or tax increases at a later date without a vote of its electorate. To prevent local governments from circumventing the requirements of Propositions 13 and 26 with impunity, MWD's scheme must be subject to validation now, and the demurrers overturned.

III. Appellants Have Standing

MWD argued that Appellants do not have standing to bring their reverse-validation action as they do not pay MWD's wholesale water service rates or property taxes within MWD's service area, and their claims have no relation to their organizational purposes. (AA082.) The trial court did not address this argument.

To the extent that this Court addresses this argument, Appellants have standing to challenge MWD's authorization of indebtedness as "interested persons." (Code Civ. Procedure § 863.) Courts have interpreted section 863 as applying to many types of plaintiffs in validation cases, including: "a citizen, resident and taxpayer of the city" and "a person interested in the matter" of a redevelopment plan (*Card v. Cmty Redevelopment Agency* (1976) 61 Cal.App.3d 570; 574); residents and taxpayers of the city in which a redevelopment project was located but who did not live within the specific redevelopment area (including an unincorporated association made up of such residents) (*Regus v. City of Baldwin Park* (1977) 70 Cal.App.3d 968, 972); an unincorporated association "composed of taxpayers, residents, landowners and/or registered voters" whose "sole purpose for existence is to watch for and follow annexation proceedings and to test the validity of annexations when they occur" (*Citizens Against Forced Annexation v. Cty. of Santa Clara* (1984) 153 Cal.App.3d 89, at pp. 89 and 97); and school districts whose future tax bases might be affected by unspecified future financing authorized by a redevelopment plan (*Meaney v. Sacramento Housing & Redevelopment Agency* (1993) 13 Cal.App.4th 566, 573-574).

Much like the plaintiff associations in *Regus* and *Citizens Against Forced Annexation*, Appellants each allege that they are non-profit organizations with taxpaying and rate-paying members living within MWD's service area. (AA009 [FAC, ¶¶ 1, 2].) Like the association plaintiff in *Citizens Against Forced Annexation*, which the court found to have a "direct organizational interest in the annexation procedures," i.e., an interest in "see[ing] that the government wielded its annexations power properly," Appellants allege an interest in "ensuring that MWD complies with law and requirements implicated in" MWD's financial authorizations. (*Citizens Against Forced Annexation v. Cty. of Santa Clara*, *supra*, 153 Cal.App.3d at p. 98; AA009 [FAC, ¶¶ 1, 2].) And like the school district in *Meaney* that would be affected by unspecified future financing authorized in a development agreement, Appellants allege that they will be exposed to excessive and undue financial risks and losses of accountability due to the unspecified future tax and/or rate increases authorized by MWD's WaterFix bond authorizations. (*Meaney v. Sacramento Housing & Redevelopment Agency*, *supra*, 13 Cal.App.4th at p. 573; AA010-011; AA018-019.)

Although no published case addresses standing in validation actions against a water wholesaler, courts have consistently recognized plaintiffs' "direct interest" in validation actions even when their financial interests were indirect. For example, in *Regus v. City of Baldwin Park*, the court determined that the plaintiffs had standing to challenge the financing of a redevelopment project because the project would divert revenues from some agencies (to which the plaintiffs paid taxes) to the redevelopment agency. (*Regus v. City of Baldwin Park, supra*, 70 Cal.App.3d at pp. 972.) Nothing in the opinion suggests that the plaintiffs' taxes would go up, but the court nonetheless found that plaintiffs' interest in the financial affairs of agencies to which they paid taxes was "likely to motivate plaintiffs to prosecute the action vigorously and provides sufficient basis to give them standing." (*Id*.) Similarly, the court in *Meaney v. Sacramento Housing & Redevelopment Agency* found the plaintiff school districts to have standing to challenge the authorization of a redevelopment plan even though the financing agreement did "not commit the Agency to any specific form of financing," but made possible the future issuance of tax incremental bonds and subordinated the County's (and thus the school districts') interest in potential future

property taxes within the redevelopment area. (*Meaney v. Sacramento Housing & Redevelopment Agency*, *supra*, 13 Cal.App.4th at pp. 573-574.)

Here, Appellants and/or their members are customers of water retailers who obtain their water from MWD. Like the plaintiffs in *Regus*, Appellants have an interest in the financial affairs of their water providers and in the financial affairs of their providers' water wholesaler (especially because that wholesaler can levy taxes directly on Appellants and/or their members). These interests are sufficient to clearly motivate Appellants to prosecute this action vigorously.

MWD also argues that Appellants lack associational standing because the claims asserted in the FAC are not germane to the organizations' purposes. (AA085-086.) But MWD selectively quotes the FAC, diminishing both organizations' stated interest in the litigation. While Food & Water Watch is indeed "a non-profit 'that champions clean water and healthy food for all'" (AA085-086), the organization also "stands up to corporations that put profits before people, and advocates for a democracy that improves people's lives and protects our environment." (AA011 [FAC, ¶ 8].) Similarly, while the Center for Food Safety's members can indeed be "characterized by

their interest in 'food production and equitable water distribution,'" (AA083), the organization also works "to protect human health and the environment by promoting sustainable agriculture." (AA010 [FAC, ¶ 9].) MWD's statement that "none of these organizing principles touches on the public-finance concerns raised by Plaintiffs' FAC" (AA083) is directly contradicted by Food & Water Watch's advocacy "for a democracy that improves people's lives and protects our environment," which is clearly germane to this lawsuit's goal of holding a public agency accountable to the law and the public, and by the Center for Food Safety's purpose of promoting sustainable agriculture, which is clearly germane to MWD's attempt to shift an unreasonable and disproportionate burden of the costs of the WaterFix project, that will significantly benefit large agricultural water users in the San Joaquin Valley, to the residential and commercial public that is dependent on MWD for their water. (See AA020-021 [FAC, ¶¶ 50-59].) A "court must assume the truth not only of all facts properly pled, but also of those facts that may be implied or inferred from those expressly alleged in the" pleading. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459.) Applying this standard, Appellants clearly have standing as

associations representing their members' legitimate interests in MWD's authorization of indebtedness.

CONCLUSION

MWD finally authorized billions of dollars of uncapped debt in the form of revenue bonds. Under the plain language of the validation statues, which not only permit but mandate that validation challenges be brought within 60 days of an agency's *authorization* of debt, Appellants' action was timely and the demurrers should be overruled.

To the extent that the other facts related to Appellants' validation challenge (such as MWD's failure to secure voter approval for its required rate and/or tax increases) has anything to do with whether the action is ripe or not, it clearly is ripe. First, Appellants allege that MWD had no lawful means of repaying its debt obligation, a basis itself for a finding of invalidity. Appellants also allege that MWD's authorization of bonded indebtedness violated the plain language of the Metropolitan Water District Act, another independent basis for a finding of invalidity. Finally, Appellants allege that MWD's authorization of bonded indebtedness that is dependent on future rate and/or tax increases violated Propositions 13 and 26. This, too, supports a finding of invalidity, regardless of the fact that the

anticipated and planned tax and/or rate increases have not yet been imposed. For this is a validation action, not a taxpayer challenge. Ripeness is determined by the agency's authorization, not its subsequent actions.

For these reasons and those discussed above, Appellants respectfully request reversal of the trial court's decision, and that MWD's and SDCWA's demurrers be overruled.

RESPECTFULLY SUBMITTED,

DATED: January 7, 2020

BY: 
Adam Keats

BY: 
Roger B. Moore

Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to CRC Rule 8.204(c)(1), this brief contains 7141 words, according to the word count feature of Microsoft Word, and therefore complies with the 14,000 word limit for opening briefs.

/s/ Adam Keats
Adam Keats

PROOF OF SERVICE

I, Adam Keats, am over eighteen years of age and not a party to this action. I am employed in the county where the service took place. My business address is 303 Sacramento Street, 2nd Floor, San Francisco, CA 94111.

On JANUARY 7, 2020, I caused to be served the following documents:

Appellants' Opening Brief

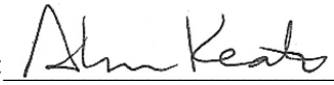
Appellants' Appendix, Volumes I and II

Notice of Change of Attorney Information

on the parties in this action, whose attorneys are listed in the True-Filing service directory for this matter, by utilizing the e-filing service offered by True-Filing.

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

Executed this 7th day of January, 2020, in San Francisco, California.

By: 

Adam Keats