

1 MANATT, PHELPS & PHILLIPS, LLP  
2 GEORGE M. SONEFF (State Bar No. 117128)  
3 EDWARD G. BURG (State Bar No. 104258)  
4 DAVID T. MORAN (State Bar No. 217647)  
5 11355 West Olympic Boulevard  
6 Los Angeles, California 90064-1614  
7 Telephone: (310) 312-4000  
8 Facsimile: (310) 312-4224  
9 *Attorneys for Petitioner*  
10 GOLDEN STATE WATER COMPANY

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 FOR THE COUNTY OF VENTURA

13 GOLDEN STATE WATER COMPANY, a  
14 California Corporation,

15 Petitioner/Plaintiff,

16 vs.

17 CASITAS MUNICIPAL WATER  
18 DISTRICT, a quasi-municipal corporation,  
19 CASITAS MUNICIPAL WATER  
20 DISTRICT COMMUNITY FACILITIES  
21 DISTRICT NO. 2013-1 (OJAI), a  
22 purported community facilities district,  
23 ALL PERSONS INTERESTED IN THE  
24 VALIDITY OF CASITAS MUNICIPAL  
25 WATER DISTRICT RESOLUTIONS  
26 NOS. 13-12, 13-13, AND 13-14 and  
27 DOES 1 through 50, inclusive,

28 Respondents/Defendants.

Case No. 56-2013-00433986-CU-WM-VTA

(Case Assigned to Hon. Mark S. Borrell)

**GOLDEN STATE WATER COMPANY'S  
OPENING BRIEF RE HEARING ON  
INVALIDATION OF CASITAS MWD'S  
MELLO-ROOS ACT FINANCING PLAN**

**[FILED CONCURRENTLY WITH REQUEST FOR  
JUDICIAL NOTICE]**

Date: June 10, 2013  
Time: 8:30 a.m.  
Dept.: 43

Case Filed: March 26, 2013

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1 **OVERVIEW OF THIS CASE**

2 For over a century, Golden State Water Company ("**Golden State**") and its predecessors  
3 have provided public water service to the City of Ojai, California. Golden State owns all of the  
4 water system facilities — the water wells, pumps, tanks, water mains, easements, water rights,  
5 etc. — necessary to serve Ojai, and provides service pursuant to rates set by the California Public  
6 Utilities Commission.

7 Casitas Municipal Water District ("**Casitas MWD**"), which provides agricultural and  
8 municipal water in areas adjacent to Ojai, wants to expand its operations to become the water  
9 service provider to the City of Ojai. Golden State has made clear that its Ojai water system is not  
10 for sale. Accordingly, Casitas MWD intends to exercise the power of eminent domain to try to  
11 take Golden State's Ojai water system, gain control of Golden State's valuable water rights, and  
12 supplant Golden State as Ojai's water service provider.

13 To generate the funds necessary for its eminent domain litigation plan, Casitas MWD's  
14 Board passed resolutions for the formation of a Community Facilities District – Casitas Municipal  
15 Water District Community Facilities District No. 2013-1 (Ojai) (the "**CFD**"). A CFD is a  
16 financing district created pursuant to the Mello-Roos Community Facilities Act of 1982 (the  
17 "**Mello-Roos Act**"), Government Code Section 53311 *et. seq.* Casitas MWD's plan is to have its  
18 newly-created CFD entity sell up to \$60 million in bonds, subject to voter approval at a special  
19 election to be held on August 27, 2013. The bond proceeds would be used to fund all costs of the  
20 attempted eminent domain seizure of Golden State's property. The bonds would be repaid by new  
21 property taxes levied upon nearly every parcel of land in the City of Ojai, secured by tax liens  
22 against each parcel. The new CFD is to be controlled by Casitas MWD's Board of Directors.

23 Casitas MWD's proposed \$60 million CFD funding proposal would create, in dollar terms,  
24 the largest CFD in the history of Ventura County, and one of the largest ever formed in the State  
25 of California.<sup>1</sup>

26 <sup>1</sup> As shown in the accompanying Request for Judicial Notice, the California Debt and Investment Advisory  
27 Commission tracks the hundreds of CFDs that have been created in the state in the three decades since  
28 adoption of the Mello Roos Act. (RJN, Ex. 1) Of those, a total of 16 CFDs have been created in Ventura  
County, ranging in amount from \$800,000 to \$38 million, with an average of \$12.4 million. Only a  
handful of CFDs statewide have exceeded \$60 million.

1 This lawsuit is necessary because Casitas MWD's funding plan violates the law. The  
2 Mello-Roos Act funding mechanism may not, as a matter of law, be used to finance a taking by  
3 eminent domain. The Mello-Roos Act was promulgated in the wake of Proposition 13 to provide  
4 developers and local governments with an alternative method to finance *the purchase or*  
5 *construction* of new facilities and services, such as roads, schools or parks, in developing areas —  
6 not to fund the attempted taking by eminent domain of existing facilities.

7 The Mello-Roos Act provisions are clear: The Act authorizes funding for the "purchase,  
8 construction, expansion, improvement or rehabilitation" of real or tangible property that is used  
9 for certain community facilities (Govt. Code §53313.5) — but does not authorize funding for the  
10 *taking by eminent domain* of such facilities. A taking is not the same thing as a purchase.  
11 California law distinguishes between "purchase" and "taking by eminent domain" in a variety of  
12 contexts. However, most telling is that while the Mello-Roos Act was being deliberated, the  
13 Legislature deleted language in the initial versions of the Mello-Roos Act that would have  
14 allowed financing for acquisition by eminent domain. Early drafts of the Act would have allowed  
15 funding of facilities to be acquired by "purchase, or eminent domain," but that language was  
16 changed during the legislative process to allow for acquisition of facilities only by "purchase."  
17 Under the rules of statutory interpretation, deletions of certain provisions in the legislative  
18 process is a "most persuasive" reason for Courts not to interpret legislation in a manner that  
19 effectively re-inserts provisions deleted by the Legislature. (*See*, pp. 15-16 below)

20 Contrary to the statutory language and the legislative history, Casitas MWD's formal  
21 Resolutions make clear that it plans to use the proceeds from \$60 million in Mello-Roos Act  
22 bonds to pay for all costs of the eminent domain litigation — for all damages and compensation  
23 awarded to Golden State, and for lawyers, appraisers, expert witnesses, etc. — and even for all  
24 damages that would be awarded to Golden State under the Eminent Domain statutes: (a) in the  
25 event the eminent domain takeover is not allowed by the Court, and is therefore involuntarily  
26 dismissed; and (b) in the event the eminent domain action is abandoned by Casitas MWD.

27 Because the Mello-Roos Act is not designed to fund an eminent domain taking, and the  
28 resultant costs and damages that flow from such action, there are glaring legal defects in the

1 documents on which Casitas MWD's plan is based. For example, Casitas MWD could not meet  
2 the most fundamental legal requirement for formation of a CFD: to describe the "public  
3 facilities" to be purchased, and to estimate their costs. Casitas MWD's description of the  
4 purported "public facilities" reads like a General Release for settlement of an eminent domain  
5 case — attempting, for example, to cover unspecified "intangible property and property rights,"  
6 even though the Mello-Roos Act allows for the purchase of only tangible property. That defect  
7 and several others are addressed below, and they require invalidation of the resulting Resolutions  
8 passed by Casitas MWD that create the CFD and authorize its bond funding.

9 As shown below, this unprecedented scheme poses major financial risks that the Mello-  
10 Roos Act does not provide for or contemplate. For example, there are legal hurdles Casitas  
11 MWD would have to surmount just to win the "right to take" Golden State's system by eminent  
12 domain. There is a strong possibility those hurdles cannot be surmounted, leading to dismissal of  
13 the eminent domain lawsuit by the Court and payment of all of Golden State's litigation expenses.  
14 And even if Casitas MWD wins the "right to take" the system, the price Casitas MWD will have  
15 to pay for the system will be determined by a jury in the subsequent just compensation  
16 "valuation" phase of the eminent domain trial. If the eminent domain action is allowed to proceed  
17 that far, and the jury's verdict exceeds the amount of the remaining bond proceeds such that there  
18 are not sufficient funds to satisfy the judgment, under the eminent domain statutes Casitas MWD  
19 may or may not be permitted by the Court to simply abandon the eminent domain action; it may  
20 be required to pay the judgment and take the property, whether it wants to or not.<sup>2</sup> Casitas  
21 MWD's proposed Mello-Roos Act funding plan states that Casitas MWD may elect to abandon  
22 the lawsuit in the event the judgment is more than Casitas MWD can "responsibly pay," but that  
23 part of Casitas MWD's plan is potentially ineffectual under the Eminent Domain Law.

24 Thus, there is a probability that the end result of Casitas MWD's proposed Mello-Roos-  
25 funded eminent domain plan would be that (1) Ojai residents are left with tax liens on their  
26 property for decades, simply to pay litigation expenses for all parties and a judgment in favor of

27 \_\_\_\_\_  
28 <sup>2</sup> These statutes are called the "Eminent Domain Law." (Code Civ. Proc. §1230.010) The statute that  
permits the Court to set aside an attempted post-judgment abandonment is Code Civ. Proc. §1268.510.



1 Golden State for damages stemming from an attempted eminent domain taking that was  
2 dismissed by the Court, or (2) the eminent domain taking is allowed, but Casitas MWD's effort to  
3 abandon the taking is denied by the Court, leaving all Casitas MWD customers (including those  
4 outside of Ojai) to find other sources to pay the eminent domain judgment that exceeds the bond  
5 proceeds. The special property taxes and liens authorized by the Mello-Roos Act are not meant to  
6 finance an empty shell consisting only of lawyers' fees and litigation costs, nor to finance  
7 litigation that could saddle taxpayers with unfunded liability arising from a jury verdict.

8 Casitas MWD has scheduled an election of Ojai voters on August 27, 2013, in which they  
9 will be asked to decide whether to endorse this unauthorized Mello-Roos Act financing plan.  
10 Golden State seeks a ruling from this Court declaring Casitas MWD's Resolutions invalid. Such a  
11 ruling will, perforce, result in cancellation of the election.

### 12 **STATEMENT OF THE PERTINENT FACTS**

13 The facts needed to adjudicate this case are not in dispute by the parties. The central facts  
14 are reflected in the Resolutions and accompanying documents generated and adopted by Casitas  
15 MWD to establish its proposed \$60 million funding plan under the Mello-Roos Act and to call for  
16 a special election; those documents are attached as exhibits to Golden State's concurrently filed  
17 Request for Judicial Notice. ("**RJN**"). The RJN also includes excerpts from the legislative  
18 history of the Mello-Roos Act, as referenced and explained below.<sup>3</sup>  
19

20 The background facts — such as the identity and legal capacity of the parties, Golden  
21 State's ownership of the water system, and the fact that Golden State operates and sets water rates  
22 pursuant to regulation by the California Public Utilities Commission ("CPUC") — are set forth in  
23 Golden State's Verified Petition and Complaint in this action, and will not be repeated in this brief  
24 except as necessary.

25  
26  
27  
28 <sup>3</sup> For ease of reference, all pages of the RJN exhibits have been consecutively numbered-stamped in the lower right hand corner.

1 CASITAS MWD'S JANUARY, 2013 RESOLUTION TO IDENTIFY THE "FACILITIES" AND INITIATE  
2 FINANCING OF THE EMINENT DOMAIN ATTEMPT

3 Over the past couple of years, some Ojai residents became vocal in their opposition to the  
4 level of Golden State's water rates that were set by the CPUC. At the urging of certain of those  
5 residents, Casitas MWD – which presently serves about half the number of retail water customers  
6 as Golden State serves in Ojai – has agreed to attempt to replace Golden State as Ojai's water  
7 provider. Because Golden State has repeatedly announced that its water system is not for sale,  
8 Casitas MWD's plan is to take Golden State's Ojai system by eminent domain litigation, using  
9 funding from the sale of bonds issued under the Mello-Roos Act.

10 On January 29, 2013, the Casitas MWD Board of Directors held a public hearing to  
11 consider adoption of a Resolution of Intention to establish the CFD, in order to finance the taking  
12 of Golden State's Ojai water system using the Mello-Roos Act. At the hearing, Casitas MWD  
13 Board member Russ Baggerly explained what would happen if the CFD were to be established  
14 and then sold bonds as planned: "There are going to be series of bonds sold, and [] some of it is  
15 for pre-eminent domain costs, some of it's for eminent domain, and some of it's for post-eminent  
16 domain costs." (RJN, Ex. 3, p. 107 [Trans 66:2-5])

17 The intended use of the bond proceeds was set forth in an attachment to the Resolution  
18 that was the subject of the January hearing. Specifically, Resolution No. 13-08 [RJN. Ex. 4, pp.  
19 119-145] includes a "**List of Authorized Facilities**" (Exhibit B to the Resolution, RJN p. 133) to  
20 be funded by the CFD bonds. That list of "Authorized Facilities" includes the following  
21 description of exactly what is to be financed:

22 **LIST OF AUTHORIZED FACILITIES**

23 The Authorized Facilities to be financed by Casitas Municipal Water  
24 District Community Facilities District No. 2013-1 (Ojai) include both of the  
25 following:

- 26 1. All costs incurred by the District to acquire the real, personal, and  
27 intangible property and property rights owned or held by the Golden State  
28 Water Company . . . Said costs shall include. . . legal costs, appraisal and  
expert witness fees, litigation expenses incurred with respect to any eminent  
domain action . . the amount of just compensation paid to Golden State

1 Water (including without limitation the fair market value for the property  
2 taken, severance damages, if any, costs for loss of business goodwill, if any,  
3 relocation expenses, if any, pre-condemnation damages, interest, property  
4 taxes, and litigation expenses payable to Golden State Water, and any other  
5 payments of any type or nature, whether paid pursuant to negotiated  
6 agreement, settlement, judgment, or other court order), and, if for whatever  
7 reason, any eminent domain action initiated by the District is dismissed or  
8 abandoned (including, without limitation due to a judicial determination that  
9 the District does not have the legal right to take the Golden State Water  
10 property or due to the District Board's determination that the amount of just  
11 compensation awarded to Golden State Water exceeds the amount the  
12 District can responsibly pay for Golden State Water's property) the damages  
13 payable to Golden State Water pursuant to California Code of Civil  
14 Procedure Sections 1268.510 and 1268.610 et seq.

15 (Ex. B to Resolution No. 13-08, emphasis added; RJN at p. 133)

16 The carefully-worded "List of Authorized Facilities" above shows that the "facilities"  
17 Casitas MWD plans to finance with Mello-Roos Act bond proceeds will include the following:

18 ► All of Casitas MWD's Eminent Domain Litigation Expenses: The CFD bonds  
19 will finance all eminent domain litigation expenses for the case against Golden  
20 State, which the above List of Authorized Facilities defines to include ". . . *legal*  
21 *costs, appraisal and expert witness fees, litigation expenses incurred with respect*  
22 *to any eminent domain action.*" (*Id.*, emphasis added)

23 ► If the Eminent Domain Taking is Not Allowed: Payment of Golden State's  
24 Litigation Expenses and Damages: If the eminent domain attempt is rejected by  
25 the Court — i.e., as described in the above List of Authorized Facilities, if there is  
26 "*a judicial determination that the District does not have the legal right to take the*  
27 *Golden State Water property*" (*Id.*, emphasis added) — the CFD will finance the  
28 "damages payable to Golden State" under the Eminent Domain Law's provisions  
for damages following dismissal, Code Civ. Proc. §1268.610.<sup>4</sup>

<sup>4</sup> Code Civ. Proc. §1268.610 requires that when an eminent domain case is "wholly or partly dismissed for any reason," the property owner is to recover its "litigation expenses." Under the Eminent Domain Law, "litigation expenses" includes attorney's fees, expert witness fees, and all other costs reasonably incurred in the proceeding. (Code Civ. Proc. §1235.140) Moreover, compensatory damages are also recoverable in

1           ▶ If the Eminent Domain Taking Is Allowed: Payment of All Compensation and  
2           Litigation Expenses to Golden State: If Casitas MWD manages to win the "right  
3           to take" phase of the eminent domain lawsuit, such that the case proceeds to the  
4           second phase (the compensation "valuation phase"), the CFD will finance the  
5           payment of all amounts including damages for both tangible and intangible losses,  
6           and for any attorney's fees owed to Golden State — i.e., payments described in the  
7           above List of Authorized Facilities to include ". . .*the amount of just compensation*  
8           *paid to Golden State Water (including without limitation the fair market value for*  
9           *the property taken, severance damages, if any, costs for loss of business goodwill,*  
10           *if any, relocation expenses, if any, pre-condemnation damages, interest, property*  
11           *taxes, and litigation expenses payable to Golden State Water, and any other*  
12           *payments of any type or nature, whether paid pursuant to negotiated agreement,*  
13           *settlement, judgment, or other court order).*" (*Id.*, emphases added) These  
14           damages and costs are legally prescribed consequences of taking by eminent  
15           domain.<sup>5</sup>

16           ▶ If the Eminent Domain Case is Abandoned by Casitas MWD: Payment of All  
17           Compensation and Litigation Expenses to Golden State: If, after receiving the  
18           jury's verdict of just compensation, Casitas MWD decides to abandon the case  
19           because the verdict is higher than Casitas MWD decides it should pay — as the  
20           List of Authorized Facilities explains, ". . . *due to the District Board's*  
21           *determination that the amount of just compensation awarded to Golden State*  
22           *Water exceeds the amount the District can responsibly pay for Golden State*

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23           certain circumstances where an eminent domain action is dismissed. (Code Civ. Proc. §1268.620)

24           <sup>5</sup> In eminent domain actions, compensation to the property owner for the items in Casitas MWD's List of  
25           Authorized Facilities is specified in various statutes that comprise the Eminent Domain Law – e.g., Code  
26           Civ. Proc. §1263.410 [award of severance damages], §1263.510 [award for loss of business goodwill],  
27           §1250.410 [determining award of litigation expenses, including attorney's fees, to property owner],  
28           §1268.310 [award of interest], §1268.410 [apportionment of property taxes]. Payment to the property  
          owner for pre-condemnation damages is governed by case law, e.g., *Klopping v. City of Whittier* (1972) 8  
          Cal.3d 39, 43-44, and payment to the property owner for relocation expenses is specified in Govt. Code  
          §7260, *et. seq.*

1           *Water's property. . .* " (*Id.*, emphasis added) — then the CFD will finance the  
2           payment of Golden State's litigation expenses and any damages that may be  
3           awarded to Golden State as a result of the abandonment.<sup>6</sup>

4           At the conclusion of the January 29 hearing, Casitas MWD adopted the Resolution of  
5           Intention to Establish the CFD and to Authorize the Levy of Special Taxes Therein (RJN, Ex. 4),  
6           which states that the above-described "List of Authorized Facilities" are ". . .proposed to be  
7           financed by the CFD." (RJN, Ex. 4, p.121, ¶5) The Resolution also instructed that a report be  
8           prepared by the General Manager of the District to study the proposed facilities to be financed,  
9           describe them, and estimate the costs of acquisition:

10           "The General Manager of the District, as the officer having charge and control of  
11           the Authorized Facilities in and for the CFD, is hereby **directed to study said**  
12           **proposed facilities** and to make, or cause to be made, and file with the Clerk a  
13           report in writing, presenting the following: **(a) a description of the Authorized**  
14           **Facilities by type, which will be required to adequately meet the needs of the**  
15           **CFD; and (b) an estimate of the fair and reasonable cost of financing the**  
16           **Authorized Facilities, including the cost of acquisition of lands, rights-of-way**  
17           **and easements, any physical facilities required in conjunction therewith, and**  
18           **incidental expenses in connection with said financing(s), including the costs of**  
19           **bond financing and all other related costs** as provided in Section 53345.3 of the  
20           Act. The report shall be made a part of the record of the public hearing provided  
21           for below." (RJN, Ex. 4, p. 122; emphasis added.)<sup>7</sup>

22           At the January meeting, Casitas MWD also set a public hearing for March 13, 2013, to  
23           conclude the formation of the CFD, as well as to approve the bonded indebtedness, the special  
24           taxes, and to call for an election to support the financing scheme.

25           **THE GENERAL MANAGER'S REPORT: THE PURPORTED ANALYSIS OF "FACILITIES" AND**  
26           **WATER RIGHTS TO BE FINANCED**

27           On March 8, 2013, Casitas MWD's General Manager issued a report called for by  
28           Resolution 13-08. The report (RJN, Ex. 6, pp. 181 to 191) is co-authored by Casitas MWD's  
29           Special Counsel. Despite being directed to provide a report that includes a "description of the

30           <sup>6</sup> The property owner's recovery of litigation expenses and potential damages stemming from abandonment  
31           are specified in the Eminent Domain Law, Code Civ. Proc. §§1268.510, 1268.610, and 1268.620.

32           <sup>7</sup> The Mello-Roos Act requires preparation of such a report, which must describe the facilities and  
33           estimated costs to be incurred, and be completed at or before the hearing at which the CFD is established.  
34           (Govt. Code §53321.5)

1 Authorized Facilities by type," (RJN, Ex. 4, p. 122) the General Manager's report does not do so.  
2 The closest thing to a description of the "Authorized Facilities" in the report is the notation that  
3 the matter involves ". . . acquisition of the property and facilities owned/held by GSW [Golden  
4 State Water] in its Ojai service area." (RJN, Ex. 6, p. 182)

5 As to the requirement that the General Manager's report study and estimate the cost of the  
6 "Authorized Facilities," the General Manager's report makes no mention of the various eminent  
7 domain-related costs and damages (attorney's fees, severance damages, loss of business goodwill,  
8 dismissal and abandonment costs, etc.) that are a central focus of the "List of Authorized  
9 Facilities." There is no description of these purported "facilities," and no attempt to estimate  
10 their costs.

11 Concerning the price Casitas MWD might have to pay Golden State for the taking of its  
12 tangible assets, the General Manager's report notes that Casitas MWD "has not yet conducted a  
13 detailed inspection of GSW's physical plant and facilities. . ." (RJN, Ex. 6, p. 185) and that an  
14 appraisal of Golden State's water system would not be performed until after the CFD was formed  
15 and approved in an election. (RJN, Ex. 6, p. 187) However, the report states that Casitas MWD is  
16 ". . . required to pay GSW the full fair market value for its property." (RJN, Ex. 6, p. 184)<sup>8</sup> The  
17 report then contains a discussion of "the so-called 'rate base' or 'book value' figure" (RJN, Ex. 6,  
18 p. 184) which the California Public Utilities Commission has on its books for Golden State's  
19 system, and asserts baldly that the figure is "[t]he best evidence of the fair market value of the  
20 GSW Ojai water utility. . ." (RJN, Ex. 6, p. 184)<sup>9</sup>

21 <sup>8</sup> As to how that value would be determined, the report paraphrases the eminent domain "fair market  
22 value" definition for determining just compensation: the highest price that a hypothetical willing buyer  
23 would pay a willing seller, each being fully informed and neither being under a compulsion to sell. (*Cf.*,  
General Manager's report at RJN, Ex. 6, p. 184 and eminent domain fair market value definition, Code  
Civ. Proc. §1263.310.)

24 <sup>9</sup> It is no surprise that this assertion is unsupported, as it is black-letter law that a regulatory rate base has  
25 little or nothing to do with fair market value of a regulated utility. See, e.g., *Petition of City of Riverside*,  
26 74 CPUC 563 (1973) (use of rate base "has little or no relationship to present market value"); *Onondagha*  
27 *County Water Authority v. New York Water Service Corporation*, 139 N.Y.S. 755 (1955) ("The lack of  
28 similarity between the original cost used in rate-making and the 'just compensation' for the purpose of  
taking needs no comment."); 8 Nichols on Eminent Domain § G14A.06 ("A utility valuation, by whatever  
approach, that is premised on a regulatory rate base that excludes significant utility assets usually results in  
less-than-just compensation for all property taken."). Thus, just compensation in eminent domain is often  
a multiple of rate base (or book value).

1 As to the taking of Golden State's water rights that would be needed for Casitas MWD to  
2 take over and operate Golden State's system, the General Manager's report rejects Golden State's  
3 prior statements that such rights would be valued at \$50 million. The report acknowledges that  
4 on March 8, 2013 (the same day as the General Manager's report) Golden State's water rights  
5 counsel sent a letter to Casitas MWD's General Manager explaining the facts and legal authorities  
6 that confirm the existence of Golden State's longstanding water rights, confirmed by the pumping  
7 history on file with the state Water Resources Control Board pursuant to Water Code §4999, *et. seq.*  
8 (RJN, Ex. 5; Ex. 6, p. 184). However, rather than addressing the authorities and analysis supplied  
9 by Golden State's counsel, the General Manager's report simply provides a polemic disputing the  
10 existence and value of those rights. The General Manager's report concludes, with no legal  
11 analysis, that the water rights claim should be dismissed as just an effort to "scare people":

12 "Whether or not GSW [Golden State Water] *does* have any such water 'rights'—  
13 there has been no adjudication establishing the existence or extent of water rights  
14 in the Ojai basin—in CMWD's [Casitas MWD's] view those rights would have no  
15 impact of the fair market value of GSW's Ojai water system and it appears to  
16 CMWD that GSW and its supporters are using the \$50 million figure in an effort  
17 to scare people into thinking a public acquisition of GSW would be infeasible."  
18 (RJN, Ex. 6, p. 184-185)<sup>10</sup>

19 Significantly, the General Manager's report does not say that Casitas MWD would not  
20 need to take Golden State's water rights by eminent domain in order to acquire and operate the  
21 water system. Obviously, Casitas MWD's "List of Authorized Facilities" specifies the need to  
22 acquire Golden State's "*intangible* property and property *rights*" just for that reason.

23 **CASITAS MWD'S MARCH AND APRIL, 2013 RESOLUTIONS TO IMPLEMENT THE FINANCING**  
24 **PLAN**

25 On March 13, 2013, the Board of Directors of Casitas MWD held a public hearing to  
26 consider adoption of the Resolutions needed to adopt the CFD financing program and submit it to  
27 the voters. Casitas MWD Board President James Word noted at the outset that "this public  
28

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29 <sup>10</sup> In fact, water rights have value and are thus compensable in eminent domain even where there has been  
30 no formal water rights adjudication, especially when the rights are documented by pumping histories as  
31 they are here. (*See, e.g., In Re Southwest Water Co.*, (1973) 74 CPUC 193, 199 [". . . the possession of  
32 pumping histories, for which protective annual reports have been filed with the Water Resources Control  
33 Board, would undoubtedly be considered by a knowledgeable buyer to have substantial value."].)

1 hearing . . . is regarding the potential eminent domain action." (RJN, Ex. 7, p. 224, p. 5:15-22)

2 At the hearing, Castias MWD adopted three Resolutions (the "March 13 Resolutions"):

- 3       ▶ **Resolution No. 13-12**, establishing the CFD, adopting the "List of Authorized  
4       Facilities" to be acquired, and authorizing the levy of a special tax to be levied against  
5       properties within the boundaries of the CFD (RJN, Ex. 8);
- 6       ▶ **Resolution No. 13-13**, declaring the necessity to issue \$60 million in bonds to finance  
7       the costs of the Facilities, and submitting the question of incurring bond debt to an  
8       election (RJN, Ex. 9); and
- 9       ▶ **Resolution No. 13-14**, calling a special election on the question of issuing \$60 million  
10       in bonds and levying **special** taxes to pay the bond debt. (RJN, Ex. 10)

11       The "List of Authorized Facilities" that was adopted as part of the Resolution establishing  
12       the CFD, Resolution No. 13-12 (RJN, Ex. 8, p. 272), is identical to the "List of Authorized  
13       Facilities" that was attached to the January 29, 2013 Resolution No. 13-08 discussed above. That  
14       List is necessary because the Mello-Roos Act requires that a Resolution establishing a CFD must  
15       "[i]dentify the facilities or services to be funded with the special tax" (Govt. Code §  
16       53325.1(a)(2)), including a description of the facilities that is "sufficiently informative to allow a  
17       taxpayer within the district to understand what the funds of the district may be used to finance."  
18       (Govt. Code §53321(c), the requirements of which are made applicable to the CFD formation  
19       process by §53325.1(a).)

20       Resolution No. 13-14 (RJN, Ex. 10) called a special election for August 27, 2013, and  
21       adopted the ballot language to be presented to the voters. That language was a 185-word sentence  
22       that asked the voters, among other things, whether the new CFD should be permitted to ". . . incur  
23       an indebtedness and issue bonds in one or more series in the maximum aggregate principal  
24       amount of \$60,000,000. . . the proceeds of which bonds will be used to finance the acquisition  
25       and/or construction of certain improvements described in the proceedings to form the CFD  
26       (herein, 'Facilities'). . .". (RJN, Ex. 10, p. 293)



1 On April 10, 2013, after this action was filed, Casitas MWD realized that its ballot  
2 language exceeded the 75-word maximum allowed under the Elections Code, so it passed  
3 Resolution 13-16 amending the ballot language. The new language asks whether the new CFD  
4 should be permitted to ". . . incur an indebtedness and issue bonds in one or more series in the  
5 maximum aggregate principal amount of \$60,000,000 to finance acquisition of Golden State's  
6 service area and/or construction of improvements benefitting the CFD." (RJN, Ex. 11, p. 298)  
7 There is no explanation of what it means to acquire a "service area," and no mention of the  
8 "facilities" to be acquired.

### 9 LEGAL ARGUMENT

#### 10 **1. OVERVIEW OF THE MELLO-ROOS ACT: FINANCING FOR SERVICES** 11 **AND/OR FACILITIES**

12 In 1978, California voters passed Proposition 13, which amended the California  
13 Constitution to, among other things, limit the nominal property tax rate to 1% of assessed  
14 valuation. Before the passage of Proposition 13, property taxes were a major source of financing  
15 for local infrastructure and services.

16 The post-Proposition 13 world was a particular problem for new developments, which by  
17 their nature required significant infrastructure investments (e.g., roads, libraries, schools, parks,  
18 etc.). To address this problem, in 1982 the California legislature adopted the Mello-Roos Act.  
19 As shown in the legislative history excerpts (RJN, Exs. 12-17, pp.299-529), the Act was designed  
20 to facilitate new development by allowing developers and local agencies to cooperate in the  
21 formation of special districts (Community Facilities Districts – "CFDs") that could levy special  
22 property taxes to be assessed against the properties that would benefit from the facilities or  
23 services to be provided – most often, those beneficiaries are the new homes being developed. As  
24 explained in *Azusa Land Partners v. Department of Indus. Relations* (2010) 191 Cal.App.4th 1:

25 "The Mello–Roos Act (Gov.Code, § 53311 et seq.) was promulgated to provide an  
26 alternative for financing public facilities in developing areas. Any local agency  
27 may establish a CFD to provide for and finance the cost of eligible public  
28 facilities. Subject to approval of a 2/3 vote of the electorate in the CFD, a local  
agency may issue bonds for the CFD and may levy and collect a special tax within

1 the CFD to pay the bonds. . . The tax is levied against the real property within the  
2 CFD's geographic boundaries. [Citation.] . . . 'The Mello-Roos Act was enacted  
3 for the express purpose of providing 'an alternative method of financing certain  
4 public capital facilities and services, especially in developing areas and areas  
undergoing rehabilitation.' (Stats.1982, ch. 1439, § 1, p. 5486.)"  
(191 Cal. App.4th at 18)

5 \* \* \*

6 "The Mello-Roos Act is an important feature of the local fiscal landscape,  
7 providing local officials with a key tool for accumulating the public capital needed  
8 to pay for the public works projects that make new residential development  
9 possible. Since 1985, CFDs have issued over \$18 billion in long-term bonds,  
10 mostly for capital improvements. CFDs created by cities account for the largest  
11 proportion of bond issues, having issued 51% of all Mello-Roos bonds between  
1992 and 2002. Without access to Mello-Roos bond funding, many builders  
would have to pay higher development impact fees and raise housing prices.' (Sen.  
Loc. Gov. Com., analysis of Assembly Bill No. 373 (2007-2008 Reg. Sess.) June  
18, 2007, p. 1-2.)" (191 Cal. App.4th at 24 [fn.12])

12 The Miller & Starr real estate treatise, explains that the Mello-Roos Act can be used to  
13 finance certain public capital services (Govt. Code §53313) or facilities (Govt. Code §53313.5):

14 "**Improvements that can be financed.** The district can finance police protection  
15 services, fire protection and suppression services, recreation program services, . . .  
16 A district also may finance the purchase, construction, expansion, improvement or  
17 rehabilitation of any tangible property with an estimated useful life of five years or  
18 longer. These facilities can include parks, open-space facilities, school sites and  
structures, libraries, child-care facilities, gas, telephone, electrical pipes and lines,  
and any other facilities authorized by law." (Miller and Starr, California Real  
Estate [3rd Ed., 2007], §25:43)

19 Section §53359.5 of the Mello-Roos Act provides that after the bonds are sold, the  
20 legislative body controlling the CFD must report annually to the California Debt and Investment  
21 Advisory Commission ("CDIAC") as to a number of details (e.g., principal amount of bonds  
22 outstanding, number of parcels delinquent on special tax payments, etc.). CDIAC prepares  
23 annual reports compiling the information for all CFDs in the state.<sup>11</sup>

24  
25  
26  
27 <sup>11</sup> RJN, Ex. 1, pp. 37-53 is an excerpt of the most recent CDIAC report listing CFDs in Ventura County.  
28 CDIAC also tracks CFD bonds that are in default (<http://www.treasurer.ca.gov/cdiac/default-draw/issuename.asp>).

1           **2.     TAKING BY EMINENT DOMAIN IS NOT AUTHORIZED UNDER THE MELLO-**  
2           **ROOS ACT**

3           Section 53313.5 of the Mello-Roos Act provides that a community facilities district may,  
4 in addition to financing services,

5           ". . . also finance the **purchase, construction, expansion, improvement or**  
6           **rehabilitation of any real or other tangible property** with an estimated useful  
7           life of five years or longer or may finance planning and design work that is directly  
8           related to the purchase, construction, expansion, or rehabilitation of any real or  
9           tangible property." (Emphasis added.)

10           In this case, Casitas MWD's Resolutions make clear that it is not intending to finance  
11           services (§53313), but rather seeks only to finance facilities (§53313.5). The taking of property  
12           by eminent domain is not a "purchase, construction, expansion, improvement or rehabilitation" of  
13           property as authorized by Govt. Code §53313.5. The legislative history shows that taking by  
14           eminent domain was not intended to be included in the Mello-Roos Act as a method to acquire  
15           facilities.

16           The Mello-Roos Act (Assembly Bill 3564) was first introduced in the Legislature by  
17           Assemblyman Michael Roos in March, 1982. An early draft of the Act proposed to allow  
18           funding for the "acquisition" of facilities. That version of the Act contained the following  
19           definition of "acquisition":

20           (a) "Acquisition" means any of the following:

21           . . .

22           (2) Any real property, rights-of-way, easements, or interests in real property,  
23           acquired or to be acquired by gifts, purchase, or eminent domain, and which are  
24           necessary or convenient in connection with the construction or operation of any  
25           facility... (RJN, Ex. 13, p. 306:20-32 and p. 317:11-23, emphasis added)

26           However, during the legislative process a critical change was made to the Mello-Roos  
27           Act: the language was modified to delete the authorization for funding of acquisition by eminent  
28           domain. (RJN, Ex. 13, p. 337:30) The Mello-Roos Act as ultimately passed by the Legislature in  
29           August, 1982, allows only the "purchase, construction, expansion, improvement or rehabilitation"  
30           of property. (Govt. Code §53313.5) The drafters of the Mello-Roos Act clearly understood the

1 distinction between purchasing and taking by eminent domain. A purchase is authorized by the  
2 Mello-Roos Act; a taking by eminent domain is not.<sup>12</sup>

3 It is highly significant that the Legislature chose to narrow the method of acquiring  
4 facilities under §53313.5 to include only "purchase" and to omit the authorization for acquisition  
5 by eminent domain. Several cases illustrate the importance of language considered but then  
6 omitted in the legislative process:

- 7 • “The fact that the Legislature chose to omit a provision from the final version of a  
8 statute which was included in an earlier version constitutes strong evidence that the act as  
9 adopted should not be construed to incorporate the original provision.” (*Central Delta*  
10 *Water Agency v. State Water Resources Control Bd.*, (1993) 17 Cal. App. 4th 621, 634)
- 11 • “The rejection of a specific provision contained in an act as originally introduced is  
12 ‘most persuasive’ that the act should not be interpreted to include what was left out.”  
13 (*Murphy v. Kenneth Cole Productions, Inc.*, (2007) 40 Cal. 4th 1094, 1107)
- 14 • “As a general principle, the Legislature’s rejection of specific language constitutes  
15 persuasive evidence a statute should not be interpreted to include the omitted language.”  
16 (*Doe v. Saenz*, (2006) 140 Cal. App. 4th 960, 985); *See also, Wells v. One2One Learning*  
17 *Foundation*, (2006) 39 Cal. 4th 1164, 1191-92 (deletion of references to governmental  
18 entities in the definition of “persons” evidences legislative intent to exclude school  
19 districts from the definition of “person”); *Sierra Club v. California Coastal Com.*, (2005)  
20 35 Cal. 4th 839, 852 (provision that was deleted before a bill’s passage shows it was not  
21 meant to be included).

22 Accordingly, the fact that acquisition by eminent domain was included in an earlier  
23 version but omitted in the final version of the Mello-Roos Act “constitutes strong evidence”  
24 (*Central Delta Water Agency*, 17 Cal. App. 4th at 634-35) and is “most persuasive” (*Murphy*, 40  
25

26 \_\_\_\_\_  
27 <sup>12</sup> The Mello-Roos Act now refers to eminent domain only in one place — at §53317.5, which provides  
28 that if a property is subject to a lien for special taxes under the Act, and that property is subsequently taken  
by eminent domain, the lien for the special taxes is to be apportioned as required in the Eminent Domain  
Law at Code Civ. Proc. §1265.250.

1 Cal. 4th at 1107) that the Act was not intended to allow the financing for taking of facilities by  
2 eminent domain. The case law demonstrates that Courts do not interpret legislation in a manner  
3 that effectively re-inserts provisions rejected in the legislative process. The broad definition of  
4 "acquisition" included in the initial draft of the Mello-Roos legislation demonstrates that the  
5 Legislature understood that a "purchase" of property is not the same thing as acquiring property  
6 by "gift" or by "eminent domain."

7 The Legislature has enacted a multitude of statutes that empower entities to acquire  
8 property by purchase or by eminent domain; if "purchase" — by itself — encompassed  
9 acquisitions by eminent domain, there would have been no need for the Legislature to specifically  
10 add the latter power to the enumerated list of the entities' rights or powers. (*See, e.g.*, Govt. Code  
11 §53382 [Community Rehabilitation Districts authorized to acquire property "**by grant, purchase,**  
12 **gift, devise, lease, or eminent domain**"]; Govt. Code §93020(c) [North Coast Railroad Authority  
13 authorized to acquire property "**by purchase, lease, gift, or through exercise of the power of**  
14 **eminent domain**"]; Pub. Util. Code §3341.1(a) [California Consumer Power and Conservation  
15 Financing Authority may acquire any enterprise "**by gift, purchase, or eminent domain**"]; Sts.  
16 & Hwy Code §11101.5 [under Pedestrian Mall Law of 1960, legislative body may acquire  
17 property "**by gift, purchase, eminent domain or otherwise**"]; Sts. & Hwy Code §30400  
18 [California Toll Bridge Authority may acquire certain property "**by gift, purchase, or eminent**  
19 **domain proceedings**"]; Sts. & Hwy Code §35108(j) [Parking District may acquire property "**by**  
20 **gift, purchase, or eminent domain**"]; Water Code §11575 (Department of Water Resources may  
21 acquire certain property "**by gift, exchange, purchase, or eminent domain proceedings**");  
22 Water Code §55370 [County Waterworks District may acquire property "**by purchase, gift,**  
23 **devise, exchange, descent, and eminent domain**"]; Educ. Code §1793 [County Board of  
24 Education may acquire property "**by purchase, gift, conditional or otherwise, or by the exercise**  
25 **of the power of eminent domain**".)]

26 Recognizing the distinction in the law between a purchase and a taking by eminent  
27 domain, the Eminent Domain Law makes clear that eminent domain and a purchase are two  
28

1 legally distinct forms of acquiring property. It provides, in pertinent part “[w]hether property  
2 necessary for public use is to be acquired by **purchase** or other means **or by eminent domain** is  
3 a decision left to the discretion of the person authorized to acquire the property.” (Code of Civ.  
4 Proc. §1230.030; emphasis added).<sup>13</sup>

5 The difference between taking property by eminent domain and merely purchasing  
6 property is obvious. The California Uniform Commercial Code defines "purchase" as being a  
7 "voluntary transaction."<sup>14</sup> But a transfer by eminent domain is by definition "involuntary."  
8 (*Johnston v. Sonoma County Agricultural Preservation & Open Space Dist.* (2002) 100  
9 Cal.App.4th 973) Owners whose property is taken are sometimes referred to as "involuntary  
10 sellers." (*Saratoga Fire Protection Dist. v. Hackett* (2002) 97 Cal.App.4th 895, 906) The Federal  
11 Tax Code recognizes property taken by eminent domain as being "compulsorily or involuntarily  
12 converted," and thus affords the owner favorable tax treatment. (26 U.S.C.A. § 1033)

13 Time and time again, the Legislature has recognized the difference between "purchase"  
14 and "eminent domain" by explicitly adding the latter power and not presuming it was included  
15 within the former. Courts do not presume that the Legislature performs idle acts in drafting  
16 statutory language. (*Shoemaker v. Myers*, 52 Cal. 3d 1, 22 [1990].)

17  
18 **3. THE CFD IS LEGALLY DEFECTIVE BECAUSE THE "FACILITIES"**  
19 **CASITAS MWD PURPORTS TO FINANCE ARE NOT AUTHORIZED UNDER**  
20 **THE MELLO-ROOS ACT**

21 Given the litigation-based purpose of Casitas MWD's CFD, it was impossible for Casitas  
22 MWD to create a legally-authorized CFD under the Mello-Roos Act.

23 The Mello-Roos Act is clear that the special taxes provided in the Act, the cornerstone of

24 <sup>13</sup> It also deserves mention that the use of the word "purchase" in section 53313.5 in the Mello-Roos Act  
25 has been recognized as consequential. In *Azusa Land Partners*, the Court held that the use of CFD bond  
26 funds to construct facilities triggers the obligation to pay prevailing wages for the project, noting that  
27 "[t]he Legislature's use of the word 'purchase' in Government Code section 53313.5 supports the  
28 conclusion. . .". (*Azusa Land Partners, supra*, 191 Cal.App.4th at 24)

<sup>14</sup> Com. Code, §1201: "'Purchase'" means taking by sale, lease, discount, negotiation, mortgage, pledge,  
lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in  
property." (emphasis added)

1 CFD financing, may not be collected for any facilities or services that are not authorized in the  
2 Act: "Any special taxes collected pursuant to this chapter may only be used **for facilities and**  
3 **services authorized by this chapter.**" (Govt. Code §53343; emphasis added)

4 On January 29, 2013, when Casitas MWD declared its intention to begin the CFD  
5 formation process, it was required to describe "the public facilities and services" it proposed to  
6 finance.<sup>15</sup> Accordingly, in preparation for that hearing, Casitas MWD unveiled its "List of  
7 Authorized Facilities." (RJN, Ex. 2, p. 74)

8 The deficiencies and irregularities in the "List of Authorized Facilities" are several—and  
9 are glaring. For starters, one might expect an actual description of facilities in this situation to  
10 include at least some reference to the water tanks, pumps, water mains, etc., that comprise Golden  
11 State's water system in Ojai. No such description is provided. Instead, Casitas MWD describes  
12 the facilities as follows:

13 "1. All costs incurred by the District to acquire the real, personal, and  
14 intangible property and property rights owned or held by the Golden State  
15 Water Company, . . . in, to, and with respect to the water utility owned and  
16 operated by Golden State in Golden State Water Ojai Service Area, whether  
or not said property is physically located within the Golden State Water Ojai  
Service Area." (RJN, Ex. 2, p. 74)

17 Accordingly, the public facilities to be financed consist solely of **costs** — "*All costs*  
18 *incurred by the District to acquire the real, personal, and intangible property and property*  
19 *rights. . . with respect to the water utility. . .*". The text of paragraph 1 in the "List of Authorized  
20 Facilities" reads like a General Release drafted for an eminent domain lawsuit, but provides no  
21 description of actual facilities. Nor does paragraph 2 of the List describe any facilities; it is  
22 merely a placeholder to preserve an option to finance other, unspecified costs Casitas may incur  
23 to do work on the water system if its eminent domain action succeeds.

24  
25 <sup>15</sup> Section 53321(c) provides in relevant part that the entity forming the CFD must:

26 "(c) Describe the public facilities and services proposed to be financed by the district pursuant to this  
27 chapter. The description may be general and may include alternatives and options, but it shall be  
28 sufficiently informative to allow a taxpayer within the district to understand what the funds of the  
district may be used to finance. If the purchase of completed public facilities or the incurring of  
incidental expenses is proposed, the resolution shall identify those facilities or expenses."

1 After declaring its intention to form the CFD, at the next hearing, on March, 13, 2013, the  
2 Resolution actually establishing the CFD to finance the "List of Authorized Facilities" was  
3 adopted. (RJN, Ex. 8, p. 272) Before a Resolution to establish a CFD can be passed, the Mello-  
4 Roos Act requires that the legislative body prepare a report describing the public facilities, and  
5 estimating the cost of those facilities.<sup>16</sup> Here, the March 8, 2013 General Manager's report (RJN,  
6 Ex. 6) purported to satisfy this requirement. However, the report does not actually describe the  
7 water system facilities, nor does it even mention the list of eminent domain litigation costs and  
8 damage awards that Casitas MWD includes in its "List of Authorized Facilities." Accordingly  
9 there is no estimate of the cost of the planned eminent domain lawsuit, despite the fact that the  
10 costs of the lawsuit are, in actuality, the "facilities" to be financed.

11 The inadequacies in the General Manager's report arise from the fact that there is no  
12 "purchase" in this situation, only a litigation plan, so the "cost of the facilities" cannot be  
13 reasonably calculated. The General Manager's report does contain references the PUC's "book  
14 value" for Golden State's water system, and eminent domain standard for "fair market value."  
15 (RJN, Ex. 6, p. 184). As noted above (see, p.9, fn. 9), book value does not equate to fair market  
16 value. Moreover, in eminent domain only a jury can make the fair market value determination  
17 (Cal. Const. Art. 1 §19), based upon testimony from qualified appraisers who follow the valuation  
18 rules set forth in the Eminent Domain Law. The General Manager's report confirms that no  
19 appraisal of Golden State's Water system had been done. (RJN, Ex. 6, p. 185) Thus, Casitas  
20 MWD could not comply with the requirements of the Mello-Roos Act because the outcome of  
21 eminent domain litigation is not knowable, and was not reasonably estimated before formation of  
22 the CFD. But, as explained below, there are other patent defects in Casitas MWD's CFD.

23 <sup>16</sup> Section 53321.5 provides in relevant part:  
24 "At the time of the adoption of the resolution of intention to establish a community facilities  
25 district, the legislative body shall direct each of its officers who is or will be responsible for  
26 providing one or more of the proposed types of public facilities or services to be financed by the  
27 district, if it is established, to study the proposed district and, at or before the time of the hearing,  
28 file a report with the legislative body containing a brief description of the public facilities and  
services by type that will in his or her opinion be required to adequately meet the needs of the  
district and his or her estimate of the cost of providing those public facilities and services. If the  
purchase of completed public facilities or the payment of incidental expenses is proposed, the  
legislative body shall direct its appropriate officer to estimate the fair and reasonable cost of those  
facilities or incidental expenses." (emphasis added)



1     **THE ACT DOES NOT PERMIT FINANCING OF INTANGIBLE PROPERTY AND PROPERTY**  
2     **RIGHTS**

3             As noted, the Mello-Roos Act defines authorized "facilities" to be ". . . **real or other**  
4     **tangible property** with an estimated useful life of five years or longer. . .". (Govt. Code  
5     §53313.5; emphasis added) Notwithstanding this clear definition, Casitas MWD seeks to finance  
6     "All costs incurred by the District to acquire the real, personal, **and intangible property and**  
7     **property rights** owned or held by the Golden State Water Company . . . ." (RJN, Ex. 8, p. 272;  
8     emphases added).

9             Financing of "intangible property and property rights" is plainly prohibited by section  
10     53313.5. Casitas MWD either ignored the statute or decided it had to take the risk that this  
11     deficiency went unnoticed, as it obviously understands that in the eminent domain lawsuit there  
12     may be large awards for taking or damaging of intangible property rights, e.g., for taking of  
13     Golden State's water rights, or for taking of Golden State's business goodwill.

14             Casitas MWD's General Manager's report disputes that Golden State has water rights  
15     (RJN, Ex. 6, pp. 184-185), but demonstrates that Casitas MWD intends to take those rights if they  
16     do exist. Water rights are "property" under California law (*State v. Superior Court of Riverside*  
17     *County* (2000) 78 Cal.App.4th 1019, 1025), as is business goodwill (Civil Code §§ 654, 655).  
18     However, both water rights and business goodwill are intangible property, which is defined as  
19     "property that is a 'right' rather than a physical object." (*Preston v. State Bd. of Equalization*  
20     (2001) 25 Cal.4th 197, 208). Thus, neither the taking of water rights or business goodwill amount  
21     to taking of physical objects, and they therefore cannot be financed by a CFD under the Mello-  
22     Roos Act.

23     **THE ACT DOES NOT PERMIT FINANCING OF POTENTIAL EMINENT DOMAIN**  
24     **LITIGATION AWARDS**

25             The "List of Authorized Facilities" adopted by Casitas MWD reflects an effort to comb  
26     the Eminent Domain Law and list the potential damages and expense awards Golden State might  
27     obtain as a result of the planned lawsuit. The List cites statutes from the Eminent Domain law  
28     and lists payments to Golden State that may be awarded in the eminent domain lawsuit for:

1 • litigation expenses (i.e., Golden State's attorney's fees, etc.); • relocation expenses; • severance  
2 damages; • pre-condemnation damages; • interest; • property taxes; • damages stemming from  
3 the Court's dismissal of the action; and • damages stemming from Casitas MWD's abandonment  
4 of the action. (RJN, Ex. 8, p. 272)

5 None of the above are authorized "facilities" under the Mello-Roos Act. The Act does  
6 authorize financing for "planning and design work that is directly related to the purchase." (Govt.  
7 Code §53313.5) However, here there is no purchase, and "planning and design work" cannot  
8 reasonably be interpreted to include financing of all the above potential eminent domain litigation  
9 awards to Golden State.

10 Further, the Mello-Roos Act authorizes bonded indebtedness to finance ". . . all costs and  
11 estimated costs incidental to, or connected with, the accomplishment of the purpose for which the  
12 proposed debt is to be incurred. . ." (Govt. Code §53345.3<sup>17</sup>) However, since the funding of  
13 litigation risks does not constitute "facilities" and is not an authorized "purpose" for incurring  
14 debt, the provision for "incidental" or "connected" costs in §53345.3 cannot reasonably be  
15 interpreted to include financing of all the above potential eminent domain litigation awards to  
16 Golden State.

17 Moreover, the definitions in the Act of "cost" and the "incidental expenses" do not  
18 encompass the potential eminent domain litigation awards to Golden State. Specifically, §53317  
19 provides the following definitions:

20 (c) "**Cost**" means the expense of constructing or purchasing the public  
21 facility and of related land, right-of-way, easements, including incidental  
22 expenses, and the cost of providing authorized services, including  
incidental expenses.

23 \_\_\_\_\_  
24 <sup>17</sup> Section 53345.3 provides in relevant part:

25 "The amount of the proposed bonded indebtedness may include all costs and estimated costs incidental  
26 to, or connected with, the accomplishment of the purpose for which the proposed debt is to be  
27 incurred, including, but not limited to, the estimated costs of construction or acquisition of buildings,  
28 or both; acquisition of land, rights-of-way, water, sewer, or other capacity or connection fees; lease  
payments for school facilities, satisfaction of contractual obligations relating to expenses or the  
advancement of funds for expenses existing at the time the bonds are issued pursuant to this chapter;  
architectural, engineering, inspection, legal, fiscal, and financial consultant fees; bond and other  
reserve funds. . ."

1 \* \* \*

2 (e) "**Incidental expense**" includes all of the following:

3 (1) The cost of planning and designing public facilities to be financed  
4 pursuant to this chapter, including the cost of environmental evaluations of  
5 those facilities.

6 (2) The costs associated with the creation of the district, issuance of bonds,  
7 determination of the amount of taxes, collection of taxes, payment of taxes,  
8 or costs otherwise incurred in order to carry out the authorized purposes of  
9 the district.

10 (3) Any other expenses incidental to the construction, completion, and  
11 inspection of the authorized work. (emphases added)

12 The open-ended and incalculable obligations to pay eminent domain-related expenses and  
13 damages referred to in Casitas MWD's "List of Authorized Facilities" are not encompassed in the  
14 above definitions.

15 **C. THE ACT DOES NOT PERMIT FINANCING OF THE FINANCIAL RISKS POSED BY EMINENT**  
16 **DOMAIN DISMISSAL OR ABANDONMENT**

17 Finally, it must be noted that Casitas MWD's effort to finance damages for its potential  
18 post-judgment abandonment of the eminent domain action is an especially egregious misuse of  
19 the Mello-Roos Act — and financially perilous for Ojai residents and for Casitas MWD's  
20 customers. The "List of Authorized Facilities" cites to Code of Civ. Proc. §1268.510, the  
21 "Abandonment" statute in the Eminent Domain Law. The List states that, after the "amount of  
22 just compensation awarded to Golden State" is determined – i.e. after the jury's verdict – Casitas  
23 MWD may then determine that the verdict ". . . *exceeds the amount the District can responsibly*  
24 *pay for Golden State's property. . .*" In that event, the term "Facilities" will include all litigation  
25 expenses and damages payable to Golden State following such post-judgment abandonment of  
26 the eminent domain litigation.

27 In other words, Casitas MWD has tried to put a "failsafe" in its Mello-Roos funding  
28 scheme, so that if the jury verdict is higher than Casitas MWD decides it can finance it will  
abandon the eminent domain takeover process, and Ojai residents will be left holding the bag by  
paying the bonds – through the new property taxes – covering all of the attorneys' fees and other

1 litigation costs for both parties, as well as any damages awarded to Golden State under the  
2 Eminent Domain Law.

3 Bad as this failsafe "abandonment" outcome would be for Ojai residents, it does not  
4 account for another, even more severe risk: after the jury renders its verdict and judgment is  
5 entered, Casitas MWD has only 30 days to decide whether to abandon the action (Code Civ. Proc.  
6 §1268.510(a)) — but even if it elects to abandon in a timely manner, the Court may reject Casitas  
7 MWD's effort to abandon the eminent domain taking. Specifically, Code Civ. Proc.  
8 §1268.510(b), empowers the Court to "set the abandonment aside" upon motion and requisite  
9 showing by the property owner. The question of whether the abandonment will be set aside has  
10 nothing to do with the size of the verdict or whether the condemning entity believes it can  
11 "responsibly pay" the award. If the Court sets aside the abandonment, Casitas MWD may be  
12 saddled with the obligation to pay a just compensation verdict of \$100 million or more, plus pay  
13 Golden State's attorneys' fees and other litigation costs (Code Civ. Proc. §1250.410), and then  
14 take and operate Golden State's Ojai water system regardless of whether Casitas MWD believes it  
15 can "responsibly pay" the judgment.

16 The "failsafe" abandonment provision Casitas MWD has tried to build into its "List of  
17 Authorized Facilities" is illusory. This poses a risk to Ojai residents and to Casitas MWD's  
18 customers outside Ojai that they will be subjected to decades of increased charges from Casitas  
19 MWD to pay a verdict that substantially exceeds the \$60 million bond limit. More to the point,  
20 this risk further illustrates why the Mello-Roos Act does not allow funding for eminent domain  
21 takings.

#### 22 4. A JUDICIAL DECISION IN THIS ACTION IS APPROPRIATE NOW

23 Actions such as this, brought under the "validation statutes" (Code Civ. Proc. §860, *et.*  
24 *seq.*) to validate or invalidate proposed governmental obligations, are to be prompted adjudicated.  
25 (*See*, Code Civ. Proc. §867 [stating that validation actions "shall be given preference over all  
26 other civil actions . . . to the end that such actions shall be speedily heard and determined."].)

27 The evidence needed to decide this case consists solely of documents from Casitas  
28 MWD's files, which are submitted with the accompanying Request for Judicial Notice. In

1 addition, to the extent the Court decides to consider legislative history materials relevant to the  
2 Mello-Roos Act, those documents are submitted as well. The merits if this action can and should  
3 be determined now.

4 Casitas MWD has filed an Answer in this case suggesting that judicial resolution should  
5 be deferred until after the scheduled August 27, 2013 election. Presumably, the argument is that  
6 the Court should wait until after the election because if the ballot measure is not passed, then  
7 there is nothing for the Court to decide. But the crux of the challenge here is to the legality of the  
8 final, formal Resolutions adopted by Casitas MWD. Those Resolutions do more than just call for  
9 a special election: they also create a CFD to fund litigation, authorize the CFD to issue bonds to  
10 finance the litigation expenses and damages, specify how the taxes will be allocated, etc.  
11 Resolution No. 13-16 that calls for the special election is merely the byproduct of the legally  
12 defective Resolutions on which it is based, and those defective Resolutions are justiciable now.

13 Moreover, to the extent that this is considered a challenge to the calling of an election,  
14 numerous courts have recognized the propriety of challenging a measure *before* it is submitted to  
15 the voters. (*See, e.g., American Federation of Labor v. Eu*, (1984) 36 Cal. 3d 687, 696-697 ["The  
16 presence of an invalid measure on the ballot . . . will confuse some voters and frustrate others, and  
17 an ultimate decision that the measure is invalid, coming after the voters have voted in favor of the  
18 measure, tends to denigrate the legitimate use of the initiative process."]; *Citizens for Responsible*  
19 *Behavior v. Superior Court*, (1991) 1 Cal. App. 4th 1013, 1023 ["That the people's right to  
20 directly legislate through the initiative process is to be respected and cherished does not require  
21 the useless expenditure of money and creation of emotional community divisions concerning a  
22 measure which is for any reason legally invalid."]; *Save Stanislaus Area Farm Economy v. Board*  
23 *of Supervisors*, (1993) 13 Cal. App. 4th 141, 151 [trial court has the power to order an initiative  
24 removed from the ballot if the matter is "invalid for any reason"].)

25 Casitas MWD's Answer also suggests that this lawsuit is premature under the Mello-Roos  
26 Act. While the Act sets the *latest date* to file legal challenges to the levy of a special tax or the  
27 validity of bonds as 30 days after voter approval (Gov't Code §§ 53341, 53359), there is no  
28

1 proscription against challenging CFD formation or agency Resolutions *before* voter approval.  
2 The Legislature adopted several "no earlier than" time periods in the Mello-Roos Act, showing it  
3 knew how set a "first day" for an action when it wanted to – but the Legislature did *not* set any  
4 "first day" for filing a legal challenge. (*See, e.g.*, Gov't Code §53321(e) [hearing on  
5 establishment of a district "shall be not less than 30 or more than 60 days after the adoption of the  
6 resolution"]; §53326(a) (election regarding levy of special taxes must be held "at least 90 days,  
7 but not more than 180 days, following the adoption of the resolution of formation"); §53365  
8 (notice designating bonds for redemption "shall be mailed not less than 30 nor more than 90 days  
9 prior to the date fixed for redemption").

### 10 CONCLUSION

11 A takeover of Golden State's water system is enticing to Casitas MWD because it would  
12 give Casitas MWD access to Golden State's valuable water rights in the Ojai Valley, and would  
13 more than double Casitas MWD's retail customer base. But Golden State's Ojai system is not for  
14 sale, so Casitas MWD wants to seize it by eminent domain.

15 The impediments for Casitas MWD are (1) that it lacks the funds to prosecute expensive  
16 eminent domain litigation, and (2) politically, it can't impose the cost of a speculative takeover  
17 effort on its existing customers outside of Ojai. Casitas MWD has imagined that the Mello-Roos  
18 Act provides a scheme to overcome these impediments by raising \$60 million to fund the eminent  
19 domain prosecution, all on the backs of Ojai property owners. The scheme doesn't work. The  
20 law is called the "Mello-Roos Community Facilities Act of 1982" — not the "Mello-Roos  
21 Litigation Funding Act of 1982."

22  
23 Dated: May 10, 2013

MANATT, PHELPS & PHILLIPS, LLP

24 By: 

George M. Soneff

Attorneys for Petitioner/Plaintiff

GOLDEN STATE WATER COMPANY

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**PROOF OF SERVICE**

I, Marla L. Chung, declare as follows:

I am employed in Los Angeles County, Los Angeles, California. I am over the age of eighteen years and not a party to this action. My business address is MANATT, PHELPS & PHILLIPS, LLP, 11355 West Olympic Boulevard, Los Angeles, California 90064-1614. On May 10, 2013, I served the within:

**GOLDEN STATE WATER COMPANY'S OPENING BRIEF RE HEARING ON INVALIDATION OF CASITAS MWD'S MELLO-ROOS ACT FINANCING PLAN**

on the interested parties in this action addressed as follows:

See attached Service List

(BY MAIL) By placing such document(s) in a sealed envelope, with postage thereon fully prepaid for first class mail, for collection and mailing at Manatt, Phelps & Phillips, LLP, Los Angeles, California following ordinary business practice. I am readily familiar with the practice at Manatt, Phelps & Phillips, LLP for collection and processing of correspondence for mailing with the United States Postal Service, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for collection.

**X** (BY OVERNIGHT MAIL) By placing such document(s) in a sealed envelope, for collection and overnight mailing at Manatt, Phelps & Phillips, LLP, Los Angeles, California following ordinary business practice. I am readily familiar with the practice at Manatt, Phelps & Phillips, LLP for collection and processing of overnight service mailing, said practice being that in the ordinary course of business, correspondence is deposited with the overnight messenger service, FedEx, for delivery as addressed.

**X** (BY ELECTRONIC MAIL) By transmitting such document(s) electronically at \_\_:\_\_ \_\_. from my e-mail address, mchung@manatt.com at Manatt, Phelps & Phillips, LLP, Los Angeles, California, to the person(s) at the electronic mail addresses listed above. The transmission was reported as complete and without error.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on May 10, 2013, at Los Angeles, California.

  
\_\_\_\_\_  
Marla Chung

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Service List

Attorneys for Respondents/Defendants  
CASITAS MUNICIPAL WATER DISTRICT and  
CASITAS MUNICIPAL WATER DISTRICT COMMUNITY  
FACILITIES DISTRICT NO. 2013-1 (OJAI)

Rutan & Tucker, LLP  
Jeffrey M. Oderman  
William M. Marticorena  
611 Anton Boulevard, Suite 1400  
Costa Mesa, CA 92626-1931  
Telephone: (714) 641-5100  
Facsimile: (714) 546-9035  
[joderman@rutan.com](mailto:joderman@rutan.com)  
[bmarticorena@rutan.com](mailto:bmarticorena@rutan.com)

Arnold, LaRochelle, Mathews, Vanconas & Zirbel, LLP  
Denis LaRochelle  
John Mathews  
300 Esplanade Drive, Suite 2100  
Oxnard, CA 93036  
Telephone: (805) 988-9886  
Facsimile: (805) 988-1937  
[dlarochelle@atozlaw.com](mailto:dlarochelle@atozlaw.com)  
[jmathews@atozlaw.com](mailto:jmathews@atozlaw.com)